THE
MADRAS LAW JOURNAL

VOL.] JANUARY, 1926. [L.

NOTES OF INDIAN CASES.

GOURI PROSAD DEY *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, I L R 52 Cal. 615.

The learned Judge had to consider in this case whether the English Common Law right of a private person to arrest another in the case of felonies applies to this country and his Lordship came to the conclusion that a private person cannot arrest another except under the conditions prescribed by S. 59 of the Criminal Procedure Code and the English rule has no force here. A similar question came up before a Full Bench of five Judges in Madras in *Gopal Naidu v. King-Emperor* (1) where they came to the same decision although previously it had been considered otherwise in *In re Ramaswami Aiyar* (2). It seems somewhat strange that the Full Bench decision is not adverted to in the decision under notice, although it fully supports the view taken by the learned Judge. The circumstance that in the Madras case criminal liability for wrongful confinement was in question while in the present case it is a civil liability for false imprisonment is immaterial for the purpose of distinguishing it, as the definition of wrongful confinement in S. 342 of the Indian Penal Code will substantially apply to the case of false imprisonment as a civil wrong.

The question when a person who makes a charge against another to a police officer who takes the latter into custody is liable for false imprisonment depends really on a finding of fact. Where he merely gives information to a police officer of his belief in the commission of a crime by another and the police officer arrests him in the exercise of his judgment on the materials available, the private person will not be liable for false imprisonment, even although it may turn out that the accused was innocent. The reason of the rule as stated by Pollock, C. B. in *Emma Grinham v. Walley* (3) is that people

1. (1922) I L R 46 M 605: 44 M L J 655 (F B).
2. (1921) I L R 44 M 913.
3. 4 H & N 496.

ought not to be in peril for making a complaint when a crime is committed. The two cases referred to in the judgment of the learned Judge fall on this side of the line. Where a person gives another into the custody of the police on a complaint and the police officer would not arrest on his own responsibility, it is really a case of causing the detention of the latter by the hand of the police officer as agent. The case of *Hopkins* v. *Crowe* (4) belongs to this category. In this connection, it may be mentioned that in *Balbhaddar Pande* v. *Basdeo Pande* (5), the learned Judges did not clearly distinguish between the case of false imprisonment and malicious prosecution, the former being an imprisonment through an executive officer, while the latter is through a judicial officer as pointed by Willes, J. out in *Austin* v. *Dowling* (6). The case of *Narasinga Row* v. *Muthaya Pillai* (7), which the learned Judges purported to follow, was one of malicious prosecution and had nothing to do with false imprisonment.

BHIKUBAI *v.* HARIBA, I L R 49 Bom. 459.

Notwithstanding the frequency with which they have come up before the Courts, the questions whether an unchaste widow is entitled to maintenance from the co-parceners of her deceased husband and if she is not entitled to maintenance, whether she regains the right if she gives up the immoral life and the rate at which the reformed widow can claim maintenance are by no means settled and especially so in Bombay. No definite answers to these questions can be obtained from the Hindu Law texts on the subject. The various views that have been held on these questions have been stated by Dr. Gour in his Hindu Code, para. 1040. One view is that with her unchastity, her maintenance is reduced to a starving allowance and residence but not cancelled altogether. Another view is that it is forfeited altogether. The third view is that though a widow's right to maintenance is completely forfeited when she is leading an immoral life, she gets a right to bare maintenance when she gives up her bad ways and becomes reformed in life. The decisions supporting each one of the views are also referred to by the learned author. The case under notice falls under the third head referred to above. The first two views did not come up for consideration in this case as the Court

4. 4 A & E 774. 5. (1906) I L R 29 A 44.
6. L R 5 C P 534. 7. (1902) I L R 26 M 362: 12 M L J 389.

found that the widow had reformed her life; but Shah, J., has expressed the opinion that an unreformed widow forfeits entirely her right to maintenance. It is not easy to reconcile this opinion with some of the observations of Chandavarkar, J. in *Parami v. Mahadevi* (1), although the preponderance of authority is clearly in favour of Mr. Justice Shah's opinion. *Roma Nath v. Rajonimoni Dasi* (2), *Nagamma v. Virabhadra* (3) and *Kandasami Pillai v. Murugammal* (4). It must be mentioned in this connection that no distinction has been drawn in the decisions between cases of unchaste wives and unchaste widows. The view that a reformed Hindu widow is entitled to bare maintenance is not only consistent with sound reason so that she may not have to resort to her old evil ways for earning her livelihood, but is supported by *Sathyabhama v. Kesavacharya* (5) and the opinion of Sir Ernest Trevlyan in his book on Hindu Law before this decision was given.

LAL BAHADUR *v.* AMBIKA PRASAD, I. L. R. 47 All. 796 (P. C.).

Ramadin and Pateshwari were brothers and joint managers. They effected two mortgages in 1895, one of which was a usufructuary mortgage and the other, a simple mortgage. Ramadin had two sons at the time, Awadh Behari and Jantri Prasad, one 13 years and the other 3 years old. In 1904, the two brothers Ramadin and Pateshwari sold the immoveable property already the subject of usufructuary mortgage referred to in payment of the usufructuary mortgage, the interest of the other mortgage and of certain decree debts and for a certain amount paid in cash to the vendors for payment of Government revenue, etc. Plaintiffs who were the sons of Awadh sought to impeach the sale. Neither of them was in existence at the date of the mortgages. Inadequacy of price was not one of the grounds suggested for impeaching the sale; the only ground was that there was no family necessity. The main question was as to whether prior mortgage debts were valid antecedent debts justifying the sale. Their Lordships held they were, following the ruling in *Brij Narain v. Mangal Prasad* (6). Their Lordships go further and say that as these plaintiffs were not in existence at the date of the mortgages, the mortgages were binding on them,

---

1. (1909) I L R 34 B 278.
2. (1890) I L R 17 C 674.
3. (1894) I L R 17 M 392.
4. (1895) I L R 19 M 6.
5. (1915) I L R 39 M 658 : 20 M L J 87.
6. (1923) I L R 46 A 95 : 46 M L J 23 (P C).

the only joint family estate to an interest in which they succeeded being an estate which to the extent of these mortgages had already been alienated. It has been already decided by their Lordships that for purposes of limitation the only persons contemplated are the persons in existence at the time of the alienation in question but this decision seems to go further in that it holds that the only persons that can question also are those in existence at the time of the alienation complained of. If they do not choose to question, the members subsequently born cannot question. So far as the usufructuary mortgage was concerned, it might be said that the members in existence had been barred at the time of the suit so as to bring the case within the earlier ruling. But so far as the simple mortgage was concerned though a suit for a declaration as to its invalidity might have been barred, in a suit upon the mortgage it would have been open to them to deny their invalidity and it could not be said that mortgagee acquired any right to the mortgage by adverse possession.

A somewhat different view, though not consistently, had been taken in Allahabad that though for purposes of limitation only those in existence reckon and also if those in existence at the time of the alienation ratify before other members are born into the family the alienation is binding, if there is no complete ratification before that time, the subsequently born members can question the alienation. Their Lordships seem to differ from this and to hold that such alienations are binding on subsequently born members. Their Lordships do not decide that subsequently born members would not have the benefit of the restoration of the property to the family but the only persons that can take steps to restore the family are apparently only those in existence at the time of the alienation.

MANIKBHAI *v.* GOKULDAS, I L R 49 Bom. 520.

The question that arose in this case is one of great interest, although in its identical form it is not likely to come up for decision in the other provinces, as the adoption of a person after marriage is not permitted outside the Bombay Presidency where the Mayukha school of law permits such adoptions. A Hindu, who was the sole owner of ancestral properties which descended to him from his father, was adopted into another family when he had a wife and a daughter in the original family ; and the question arose after his death as to who was entitled to the properties, whether it was his widow or daughter or the heirs of his late father. The learned Judges have held that daughter succeeds to them. Although the exact question of a married man with children having been adopted into another family has not arisen and cannot arise in other provinces, the question of the rights of a person adopted with regard to the property vested in him in the family of his birth has frequently come up for consideration in recent years. That the analogy of a rebirth of the adopted person in the new family can hardly be said to be complete has been pointed out by the Madras High Court in *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row and others* (1) and approved by the Bombay High Court in *Mahableshwar Narayan* v. *Subramanya Shivram* (2) and also in the case under notice. The adopted boy has not his initiatory ceremonies performed once more in the new family ; and the prohibition against marrying the relations within the prohibited degrees in the original family still continues. After an exhaustive consideration of all the texts bearing on the subject the conclusion was come to in *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row and others* (1), that when ancestral properties have become vested in a sole surviving member of a joint family, he is not divested of them when he is adopted into another family and his heirs after adoption inherit those properties as they succeed to his other separate properties or self-acquisitions. This view was not accepted in Bombay in *Dattatraya Sakharam* v. *Govind Sambhaji* (3) where it was held that he even forfeited the properties that were solely vested in him in the natural family prior to the adoption and reliance was placed on the very texts referred to in

1. (1905) I L R 29 M 437: 16 M L J 178.
2. (1922) I L R 47 Bom 542. 3. (1916) I L R 40 Bom 429

Sri Rajah Venkata Narasimha Appa Row v. *Sri Rajah Rangayya Appa Row and others* (1) though as pointed out by Macleod, C.J. in the case under notice, the texts do not deal with an only son's adoption which was not contemplated by them at all, but could only refer to one of several sons being adopted in which case his coparcenary rights in the natural family will cease by the adoption. The case of one member of a joint family being adopted does not really present much difficulty because it is the family in such cases that owns the properties, as a *quasi* corporation as it were, and no member can predicate a definite share to himself till partition as was laid down by the Privy Council in *Appovier* v. *Rama Subba Aiyan and others* (4) and when he goes out of the family, his rights in the family properties cease with it. *See* Sarvadhikari's *Hindu Law of Inheritance*, 2nd edition, p. 431. We doubt very much whether the learned Judges in *Dattatraya Sakharam* v. *Govind Sambhaji* (3) would have extended their decision to a case where prior to the adoption, a boy had properties descended to him on his maternal line and held that he forfeited those properties as well. But even the forfeiture of paternal properties which descended prior to adoption was not approved of in *Mahableshwar Narayan* v. *Subramanya Shivram* (2), where the learned Judges approve of *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row and others* (1) but only purport to distinguish the case of *Dattatraya Sakharam* v. *Govind Sambhaji* (3), while the logical result of their reasoning would have been to dissent from it, as the original root of title where a son holds his share after a partition with his father and where it descends to him after his father's death is the same, *viz.*, that he was a member of the family, deriving a right by birth in his father's estate. Under these circumstances it cannot but be regarded that the authority of *Dattatraya Sakharam* v. *Govind Sambhaji* (3) has been considerably shaken by the reasoning in *Mahableshwar Narayan* v. *Subramanya Shivram* (2) and by many of the observations of the learned Judges therein. In this state of uncertainty in the law in Bombay, this decision of the learned Judges has not tended to clear the situation. In this case and in *Mahableshwar Narayan* v. *Subramanya Shivram* (2), the learned Judges have disapproved of the theory of civil death of the adopted boy in

1. (1905) I L R 29 M 437: 16 M L J 178.
2. (1922) I L R 47 Bom 542. 3. (1916) I L R 40 Bom 429.
4. (1866) 11 M I A 75.

the original family and his rebirth in the adopted family. But how it still happens that his heirs with regard to the properties solely vested in him prior to adoption as the last survivor of the family of his birth have to be found as at the date of his adoption it is not easy to see, as this result is only consistent with a civil death at the time of adoption. The anamoly of this fiction goes one step further with the result that not only he dies civilly but his wife also dies a civil death and the properties go to the daughter born prior to the adoption as the heir of the civilly dead person. We venture to think the logical view would be to give full effect to the opinion expressed in *Mahableshwar Narayan v. Subramanya Shivram* (2) and hold that the adopted person retains the properties solely vested in him prior to adoption and that they descend to his heirs to be determined at the time of his death, a view which has been found favour in Madras and Calcutta in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row and others* (1) and *Behari Lal Laha v. Kailas Chunder Laha* (5) and by the learned editor of Sarvadhikari's *Hindu Law of Inheritance* (2nd edition) at pp. 431, 432. It is possible that in this case there was no real contest between the widow and the daughter and the learned Judges did not therefore go more fully into their rival claims. The result of the view in Madras and Calcutta will be that in this case the widow will succeed and the daughter will have no claim to the inheritance as her filial relationship to her father would have been extinguished for purposes of inheritance when he was adopted into another family.

HAZARI LAL *v.* RAM LAL, I. L. R. 47 All. 746.

In this case a previous suit for partition had been brought on the footing that the family was divided and had been dismissed because the Court held that the family was joint and the suit for partition of only some of the family properties did not lie. In no view could such a suit bar a subsequent suit for partition by even the same plaintiff, *a fortiori*, by people who were defendants in the previous suit. Although it is doubtful if the contention that the family is already divided will have the effect of effecting a severance, such a statement coupled with a claim for partition as in this case, might have

1. (1905) I L R 29 M 437: 16 M L J 178.
2. (1922) I L R 47 Bom 542.
5. (1896) 1 C W N 121.

that effect. After a division in status, the parties could sue only for an account of the properties then in possession of the family and their proceeds and any presumption in respect of subsequent acquisitions as if the family still continued joint seems to be out of place. Further acquisitions will belong to the member acquiring it, the only claim of the other members being against the member for any joint funds that might have been used by him unless the acquisitions were shown to be made in a representative capacity or for the benefit of all the sharers. There would be no scope for the use of the presumptions of Hindu Law which are applicable only to the case of a joint Hindu family.

AZIZ BANO *v.* MUHAMMAD IBRAHIM HUSSAIN, I. L. R. 47 All. 823.

Two important questions of Shiah Law came up for discussion in this case: (1) The validity of the marriage of a Shiah with a Sunni; (2) Whether a minor wife whose marriage has been arranged by her parent or grandparent has the option to repudiate the marriage on attaining puberty. On both questions their Lordships followed Sharya-ul-Islam and held that the marriage was valid and that the wife had an option. Their Lordships discuss also some other general questions as to the application of that law, (1) that when the personal law of the plaintiff and the defendant differ, the law to be applied is that of the defendant; (2) that when it is doubtful which is the better opinion on a question of Muhammadan Law the Court ought to follow that opinion which is most in accord with justice, equity and good conscience; and (3) that the Shiah Law, being part of the law of the land, the evidence of a living expert is inadmissible for the elucidation thereof.

NIADAR *v.* RAMJI LAL, I. L. R. 47 All. 849.

The question in this case was as to the right of appeal under the Insolvency Act of a creditor from an order upholding the claim of third party to certain crops seized by the Receiver as the property of the insolvent. In *Jhabba Lal* v. *Shib Charan Das* (1) the Allahabad High Court had taken a somewhat narrow view of the section of the Act of 1907 which conferred a right of appeal on any person aggrieved by an order made in the exercise of insolvency jurisdiction. The present Act cannot be said to have very much altered the situation for it still insists on "being aggrieved by the order" as a condition of the appeal. But their Lordships see an inclination of the mind of the Legislature in favour of a more liberal view in the fact that the section is amplified and made to say "the debtor, any creditor, the Receiver or any other person aggrieved by the order" may appeal. The Madras High Court had taken a liberal view of the section even as it stood in the old Act.

SARVI BEGAM *v.* RAM CHUNDER SARUP, I. L. R. 47 All. 850.

In this case a judgment-debtor whose property had been sold made two applications, one under O. 21, R. 89, and another subsequently under O. 21, R. 90. The Court heard both and dismissed the first application under O. 21, R. 89 and then dismissed the one under O. 21, R. 90 on the ground that the first was a bar to the second. The argument of the Lower Court was—as under O. 21, R. 89, an application under that rule could not be presented or prosecuted unless a pending application under R. 90 is withdrawn, the party must be taken to have withdrawn it. This view did not commend itself to the High Court. They held, we think rightly, that a withdrawal could not be inferred in the circumstances and except as involving a withdrawal an application under O. 21, R. 89 is not a bar to an application under O. 21, R. 90.

The further question was as to whether the fraud under S. 18 of the Limitation Act in the case of an application to set aside a sale on the ground of fraud must be some fraud after the sale or whether it may be some fraud which began to operate before the sale and continues to operate thereafter so as to keep the party aggrieved in ignorance. Their Lordships hold that it need not necessarily be an act after the sale and may be one before the sale provided it operates after the

---

1. (1916) I L R 39 A 152.

sale and keeps the party in ignorance. Mr. Justice Sadasiva Aiyar apparently took the other view in *Payidanna* v. *Lakshminarasamma* (1). The judgments of Mr. Justice Mukerjee in *Jatindra Mohan Rai Chaudhuri* v. *Brojendra Kumar Datta Munshi* (2) and of Jenkins, C. J. in *Narayan Sahu* v. *Mohanth Damodar Das* (3) forcibly bring out the other view. Wide language in *Bhusan Mani Dasi* v. *Profulla Kristo Deb* (4) and *Baldeo Singh* v. *Meghu Singh* (5) to the effect that the limitation starts from the date of the knowledge of the fraud would seem to ignore the distinction between Art. 95 and S. 18. There may be fraud which is not known and yet it may not have the effect of keeping the party in ignorance; there may also be fraud which like suppression of notices keeps the man out of knowledge not only before sale but also after. The two cases stand on a different footing. See *Bajrang Prasad Singh* v. *Mt. Sonejhari Kuer* (6). The inclination of the Madras High Court is towards the view taken in the case under review. See *Thekkedath Neelu Neithiar* v. *Subramania Moothan* (7).

VAITHIALINGA MUDALIAR *v.* SRIRANGATH ANNI, I. L. R. 48 Mad. 883 : 49 M. L. J. 769 (P. C.).

Though at the first blush it might look as if this judgment disturbs the course of decisions in this country as to the effect of adverse possession against the widow on the reversioner's right to bring the suit on her death, it is satisfactory to note that really it has no such effect. The judgment is very unsatisfactorily phrased, but on the facts it seems only to re-affirm well-settled propositions. It no doubt affirms that adverse possession against the widow is equally adverse possession against the reversioner but from the language used at page 904 their Lordships seem clearly to recognise the right of the reversioner to sue within 12 years of the death of the widow in cases to which that Act applies. Again it affirms the old, old principle that a judgment against the widow in a suit "which was not a collusive suit but was regularly and according to due procedure at law fought out" in a Court of Law would bind the reversioner.

---

1. (1914) I L R 38 M 1076 : 28 M L J 525.
2. (1914) 19 C W N 553.
3. (1912) 16 C W N 894.
4. (1920) I L R 48 C 119.
5. (1923) 74 I C 202.
6. (1924) 85 I C 622.
7. (1919) 53 I C 809.

The suit was for the recovery of possession of certain properties which had gone into possession of a person claiming under a *de facto* adoption in 1862 and had continued in his or his representative's possession for over 12 years before the Act of 1877 came into force. In a litigation of 1887 in which the widow was the defendant, it had been held that though the adoption was invalid, the alleged adopted son had acquired under Art. 129 a right to remain in possession.

Their Lordships decide the case on this point of limitation. But they seem also inclined to hold that the previous judgment, so far as it went on the question of limitation, also bound the reversioner. The old rule was—adverse possession against the widow was adverse also against the reversioner. The Limitation Acts of 1877 and 1908, as regards suits for possession generally by the reversioner on the death of the widow, the Act of 1871 except so far as cases not governed by Art. 129 were concerned excluded the application of the rule. But otherwise, the old rule as to representation in suits and as to adverse possession which was a corollary to the former applied. The case under review was one which came within the general rule and not under the exception so that the course of decisions need not be taken as being in the slightest degree disturbed by this judgment.

The difficulty arises from the pains taken by Sir John Edge to explain away *Runchordas Vandravandas* v. *Parvatibai* (1). There was no previous suit in that case so that the rule as to representation in suits did not apply to it. So far as the question of limitation was concerned, the decision was not an *obiter*. The point directly arose and their Lordships say so, the widows being in possession of only part—the rest having been in possession of the executors as trustees for charity for over 12 years. That was not a case in which adverse possession had ripened into absolute title before the Act of 1871 came into operation but was one governed entirely by the Act of 1877. Their Lordships would seem to be clear that the reversioners would not be barred in such a case and that would seem to be the view of their Lordships even in this case.

On the point of limitation on which the case actually went, there was the previous decision in *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chowdhri* (2), which the High Court had followed and was conclusive.

---

1. (1899) I L R 23 Bom 725 (P C). 2. (1886) I L R 13 C 308 (P C).

SOUNDARARAJAN *v.* NATARAJAN, I. L. R. 48 Mad. 906 : 49 M L J 836 (P C).

There were three points in this case : (*i*) as to the validity of Act I of 1914 (Hindu Transfers and Bequests Act) so far as it was made applicable to the City of Madras, (*ii*) as to the construction of the will, and (*iii*) as to the application of Ss. 101 and 102 of the Succession Act to the case. The consideration of the first point which had been decided against the Act by the Madras High Court became unnecessary by reason of the Imperial Act VIII of 1921 which re-enacted those rules for the City of Madras with retrospective effect. The other two points arose in this way. The testator in this case gave his properties to his executors in trust to hold his estate in three shares during the lifetime of his three daughters for their respective benefit—the income to be paid to them and after their death to such of the grandchildren by those daughters as attain the age of 21 absolutely. The High Court held that the gift was in effect a gift absolutely to the daughters applying the principle of S. 126 of the Act. Their Lordships dissent from that view and hold that the intention was clear that only a life-estate was intended for the daughters, the remainder being given to such of the children as attained the given age. Their Lordships were induced to this conclusion by the clause as to the attainment of the age of 21 years which on the contrary view would have been otiose. On that view the question was as to whether the gifts to the grandchildren were valid. Some of the grandchildren were alive at the date of the death of the testator ; others were not. By reason of S. 5 of the Act VIII of 1921, the gift to unborn children was bad so far as it postponed the vesting possibly beyond lives in being and the minority of a person in existence at the end of that period. Then, the further question was, if the others could not take. Their Lordships hold that they could not by reason of S. 102. The argument was that S. 102 had no application to cases where the gift was invalidated by the *Tagore case* and not by S. 101. Their Lordships say that the rule in the *Tagore case* is now abrogated by the Act and S. 5 enacts the rule laid down in S. 101 in identical terms as applicable to Hindu wills. In the result, their Lordships say that S. 102 becomes applicable and none of the grandchildren could take. As S. 102 strike at the gift if in any contingency one of the class cannot take, their Lordships held that the gift was bad though in fact the appointment of a guardian under the Guardian and Wards Act had prolonged the minority to 21 years.

RAMJOO MAHOMED *v.* HARIDAS MULLICK, I L R 52 Cal. 695.

The questions considered in this case are of such variety and interest that will fully repay a careful study of the judgment. There were two letters between the plaintiff and the defendant in the case which embodied the terms of a lease of certain premises owned by the defendant. The plaintiff was in possession before those letters under the defendant and continued in possession after the letters were passed between the parties. The suit was one for specific performance of the agreement for lease or in the alternative for damages. The learned Judge held that the letters constituted a present demise of the properties and was inadmissible to prove the agreement and dismissed the plaintiff's suit wholly.

But for the decision of the Privy Council in *Hemanta Kumari Debi* v. *Midnapur Zemindari Co.* (1) it will not be easy to hold that an agreement which does not operate as a present demise will be excluded from the definition of lease in S. 2 (7) of the Registration Act. The very wording of the sub-section that a lease includes an agreement to lease, would seem to indicate that the expression as used in the Registration Act takes in a transaction which does not ordinarily come under its denotation. Reference may be made in this connection to the meaning of "include" in statutory definitions in Stroud's Judicial Dictionary and to the cases collected therein. And we venture to think with all respect that to say that a lease includes a demise does not convey any meaning. The anamoly of this construction of the definition clause was pointed out by Seshagiri Aiyar, J. in *Swaminatha Mudaliar* v. *Ramaswami Mudaliar* (2); but his Lordship had to give effect to the ruling of the Privy Council. And it is to be noted that the Privy Council has recently cautioned the Indian Courts against canvassing and questioning the principles of law laid down by them. *Mata Prasad* v. *Nageshar Sahai* (3). It may, however, be mentioned that even in England the case-law on the subject whether an agreement for lease operates by way of present demise or not is very conflicting and some artificial rules have been evolved and they are no longer of much practical interest there in view of the later statutes and the principle laid down in *Walsh* v. *Lonsdale* (4). *See* Woodfall's *Landlord and Tenant,* 20th edition, page 162. Having regard

1. (1919) I L R 47 C 485 (P C). 2. (1920) I L R 44 M 399: 40 M L J 161.
3. (1925) 50 M L J 18 (P C). 4. (1882) 21 Ch D 9.

to the decision of the Privy Council in *Hemanta Kumari Debi* v. *Midnapur Zemindari Co.* (1), the learned Judge in the case under notice had to go into the ancient learning as to whether the letters in the case operated by way of present demise and he came to the conclusion that they did and held that they were consequently inadmissible in evidence for decreeing specific performance or damages.

The conclusion having been come to that the letters effected a present demise which is required to be by a registered instrument under the Registration Act and Transfer of Property Act, we are not sure whether the necessary consequence is that the contents of the letters ought to be completely ignored. The lessee having already entered into possession of the demised premises and continuing his possession under the agreement contained in the letters, it may be a question whether the unregistered letters cannot be adduced in evidence to show the terms on which possession is held on the principle of the ruling in *Varada Pillai* v. *Jeevarathnammal* (5) and the cases that have followed it, as for instance *Maharani Janki Kuer* v. *Bivi Bhikan Ojha* (6). It may be also possible to uphold the transaction in the case under notice contained in the unregistered letters on the rule of part-performance which has been applied to the case of leases which are required to be by registered instruments but which do not comply with those formal requisites. *Jogendra Krishna Ray* v. *Kurpal Harshi and Co.* (7) and *Maung Chan E* v. *Ah Tit* (8). In this connection we should observe that the decision of Rankin, J., in *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri* (9) sounds to the contrary; but it is difficult to follow the learned Judge on the effect of the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (10) on the application of the rule of part-performance to transfers requiring registration under the Registration Act or the Transfer of Property Act. As to the applicability of the rule of part-performance to the cases of leases and agreements for lease in England reference may be made to Foa on *Landlord and Tenant*, pp. 355 to 359 (5th edition) where the question has been discussed and the cases considered. It is perhaps useful to notice here that after the Real Property Limitation

1. (1919) I L R 47 C 485 (P C).
5. (1919) I L R 42 M 244 : 38 M L J 313 (P C).
6. (1924) I L R 3 Pat 349. 7. (1921) I L R 49 C 345.
8. 1925 Rang. 118.
9. (1921) I L R 49 C 507. 10. (1914) I L R 42 C 801 : 28 M L J 540 (P C).

Act of 1845, demises which were void, because they were not by deed, were given effect to in England as agreements for lease. *Bond* v. *Rosling* (11) and *Tidey* v. *Mollet* (12).

MATA PRASAD *v.* NAGESHAR SAHAI, I. L. R. 47 All. 883 : 50 M. L. J. 18 (P. C.).

The only point of general interest in this case is that about the binding nature of judgments in suits brought by presumptive reversioners as against the actual reversioners. Their Lordships reaffirm the principle laid down by them in *Venkatanarayana Pillai* v. *Subbammal* [1], *Janaki Ammal* v *Narayanaswami Aiyar* [2] and *Kesho Prasad Singh* v. *Sheo Pragash Ojha* [3] on this matter.

There are only two points of variation in this case which mark it out from the common variety. One is—at the time of the suit there was another reversioner who, if the devolution was to a single heir was the nearer, and if it was the general Hindu Law that governed, would have ranked equally with the plaintiff in the suit. The suit was held competent as the other reversioner had, on his own confession, no funds and could not sue. This is apparently sufficient according to the Privy Council to render the suit maintainable so as to effectively bind the actual reversioners.

Another point was—the plaintiff in the present suit claimed that he was entitled to come in under a later Act which gave him a prior title which he had not under the general Hindu Law. Their Lordships hold that this would also make no difference. The suit was on behalf of the reversioners—who out of that body was actually entitled—be it by survival or by some special act of Legislature, was quite immaterial. It equally bound them. That apparently is their Lordships' view.

Their Lordships further proceed to remark on the binding nature of their Lordships' decisions on questions of law and fact. As to questions of law, there could be no question that they would bind in every litigation. On questions of fact also, their Lordships seem to think the judgments would bind —by reason of "judicial dignity" or otherwise as they say —not as *res judicata* but as authority, we presume.

---

11. (1861) 1 B. & S. 371. 12. 16 C. B. (N. S.) 298.

1. (1915) I. L. R. 38 Mad. 406 : 28 M. L. J. 535 (P. C.).
2. (1916) I. L. R. 39 Mad. 634 : 31 M. L. J. 225 (P. C.).
3. (1924) I. L. R. 46 All. 831 : 47 M. L. J. 824 (P. C.).

MUHAMMAD MEZHAR ALI *v.* BIGGHA BEGAM, I. L. R. 47 All. 900.

A pension was mortgaged and a decree for a sale was also passed after overruling the objection that the pension was not saleable by reason of the Pensions Act. In execution the same objection was again taken. Their Lordships held that the question could not be raised in execution. There are several possible situations in connection with matters like this. The objection might have been raised and might have been overruled after considering the question whether the pension was saleable. The question might not have been raised and a decree passed. The statutory prohibition might be directed merely against attachment. It might be against attachment or sale. If the prohibition is only to attachment, such prohibitions would not affect sales in execution of mortgage decrees. Such are the prohibitions under S. 60, Civil Procedure Code. If the prohibition is against sale, then as held in *Raja of Vizianagram* v. *Dantivada Chelliah* [1] the fact that a mortgage decree is passed would not matter. The Court is prohibited from selling. But if the question has been raised already and decided then the point would not be open in execution on the principle of *res judicata.* Though their Lordships were inclined to regard the prohibition under the Pensions Act as a prohibition of sale itself, having regard to the fact that the question had been decided on a consideration of the facts of the case that the pension in the case was saleable, held that the question was not open in execution.

---

1. (1904) I. L. R. 28 Mad. 84 : 14 M. L. J. 468.

BABA SAH *v.* PURUSHOTHAMA SAH, I. L. R. 48 M. 700 : 47 M. L. J. 932.

If the test of appealability is, as the Chief Justice puts it in *Tuljaram Rao* v. *Alagappa Chettiar* (1), "if its effect, whatever its form may be and whatever may be the nature of the application in which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment," and if the fact that the order is a discretionary order does not matter [*Srinivasa Aiyangar* v. *Ramaswami Chettiar* (2)], an order refusing to allow a person to sue as a pauper is a judgment and is appealable. But we agree that allowing a person to sue as a pauper is not within the discretion of the Court but follows as a matter of course if the specified conditions are satisfied.

SAWMY RAO *v.* THE OFFICIAL ASSIGNEE OF MADRAS, I. L. R. 48 M. 703 : 49 M. L. J. 474.

In this case their Lordships held the case to come within the exception recognised by the Privy Council in *Kishen Narain* v. *Pala Mal* (3), *viz.*, that when there are independent covenants for the payment of the principal and interest, suit on the personal covenant for interest will not have the effect of barring the principal. There were two further points of distinction between the Privy Council case and the present : (1) the first suit was brought in the Small Cause Court which would have had no jurisdiction to deal with the second suit on the mortgage, (2) Order 11, R. 2 will only prohibit a suit but would not bar a defence or any other mode available for realising the amount due.

RAMI REDDI *v.* GANGA REDDI, I. L. R. 48 Mad. 722.

The question in this case is one on which there has been very considerable conflict, *viz.*, as to whether the maternal uncle's son or the maternal aunt's son is to be preferred. The question of *bandhu* succession has been always full of difficulties and the difficulties have been multiplied a hundredfold by the Privy Council by its decisions. How is *Pratyasatti* or

1. (1910) I L R 35 M 1 at 7: 21 M L J 1 (F B).
2. (1915) 29 M L J 12 (F B).
3. (1922) I L R 4 Lah 32: 44 M L J 123 (P C).

nearness to be determined? By degrees, by spiritual efficacy, by the sex of the person through whom relation is traced, by which of these and when they conflict how at all is the question to be determined? How are degrees to be calculated when the conflict is between a man's own descendants and his father's? How uncertain the test of spiritual efficacy or superiority is can be seen by the order as to *Pindadhikara* given by Dharmasindhu. The difficulties in appraising the value of the *Pindas* to the prepositus and his various ancestors less remote and more remote, maternal and paternal, would require a very laborious examination of the Sraddha texts, etc. Mr. Justice Ramesam notices the difficulties and makes certain tentative suggestions. We have not the benefit of his views as to the guiding principle when the conflict is between one's own descendants and some ancestor's descendants. A very valuable discussion as to *Pratyasatti* as conceived and elaborated by Vijnaneswara is to be found in *Vithalrao Krishna Vinchurkar* v. *Ramrao Krishna Vinchurkar* (1) by Mr. Justice Ranade. In addition to all these questions there is the further question as to who all are *bandhus*—and there is the inexplicable judgment in *Umaid Bahadur* v. *Udoi Chand* (2).

The question involved in the case under review was not complicated by any of the difficulties indicated above. In the matter of degree the maternal uncle's and maternal aunt's son are both equal; both are connected through the maternal grandfather. In the matter of religious efficacy there could be no question, the maternal uncle's son's offering is more efficacious. The only point against the maternal uncle's son is apparently the *Patha Krama*, the order of their mention. Their Lordships differing from *Appandai Vathiyar* v. *Ragubali Mudaliar* (3) hold that it is not sufficient to overrule the priority conferred by the principle of superior religious efficacy blessed so recently by the Privy Council. *Patha Krama* at all times must be a very unsatisfactory ground for decision and no wonder it has been held to be so when especially the specifically mentioned *bandhus* have been postponed to those not specifically mentioned.

---

1. (1899) I L R 24 Bom 317, at 334 *et seq*. 2. (1880) I L R 6 C 119 (F B)
3. (1909) I L R 33 M 439: 20 M L J 275.

OFFICIAL RECEIVER, MADURA *v.* CHETTIAPPA CHETTY, I L R 48 Mad. 767 : 49 M L J 452.

Here an interesting question arose: In execution of an *ex parte* mortgage decree, the 2nd defendant in the case (a puisne mortgagee) purchased the property. Subsequently the *ex parte* decree was set aside. The question was whether the sale was liable to be set aside. The law is settled that the purchase by the decree-holder is liable to be set aside. But should not the rule comprehend all parties to the suit ? The reason of the immunity of stranger purchasers is, as pointed out by the Privy Council in *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan* (1), that "*bona fide* purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale." The reasoning would exclude party purchasers. Liability for restitution in their Lordships' opinion extends not only to the money realised but also to the property which is purchased in execution of the decree. The decree-holder in his character as decree-holder has only taken the money realised. His liability to restore the property purchased must arise from the fact that his position would have enabled him to perceive the infirmity of his title. This reasoning applies as much to other parties to the suit as to the decree-holder. The language of S 144, Civil Procedure Code, also would seem to justify that view. The Court shall cause such restitution to be made as will, so far as may be, *place the parties* in the position which they would have occupied, but for such decree or such part thereof "as has been varied or reversed." A rule of the thumb like the one suggested will preclude the necessity for a determination in each case the extent to which the decree can be said to be beneficial to the particular party in question. A puisne mortgagee in more than one particular occupies the position of a decree-holder. So far as he has a right to redeem he is undoubtedly so. He is also a decree-holder to the extent he is entitled to take the balance if any after satisfying the first mortgagee.

---

1. (1887) I L R 10 A 166 at 172 (P C).

DORAISWAMY AIYAR *v.* KING-EMPEROR, I L R 48 M 774: 48 M L J 190.

Here is an interesting case both on the facts and on the law. The accused sent certain anonymous letters purporting to emanate from the deity threatening the addressee dire consequences of the deity's displeasure if he did not pay certain amounts to the accused. On those facts, Mr. Justice Krishnan held that neither the offence of criminal intimidation nor the offence under S. 508 was made out. To bring the case within the former section, the threat must be capable of execution by the accused or at his instance. Injury by God is not one which is capable of being inflicted by the accused or at his instance and therefore not the sort of injury contemplated by the Penal Code. Spiritual agencies and injury inflicted by them are not primarily within the contemplation of the Act and till their existence and capacity to inflict injury and men's power to secure the infliction of injury through the instrumentality is demonstrated, they cannot be recognised by the Penal Law of any country. S. 508 proceeds on quite a different footing. It has reference to the state of mind of the person to whom the threat is addressed or the state of mind which the accused seeks to produce in such person. But even so, the act requires according to the learned Judge that the threatened bringing down of the divine displeasure must be through some act of the accused. "If a man says give me something or God will destroy you" that is not offence. On the other hand, if he says " If you do not give, I shall make God to destroy you" that would come within the section. The margin between the two is very narrow. Again one does not see the object of the word "become". Whatever purpose it serves is equally served by the other word "rendered" if both the words are to be qualified by the further words " by some act of his." No doubt, on that construction the section will become very wide, for instance, the Christian missionary who procures conversion by inducing a belief that if a person did not become a convert he will become an object of divine displeasure will be guilty of an offence under the section. That is no reason why the section should be read naturally. It is for the legislature to amend the law if it is too wide.

GARBHU MAHTON *v.* MUSSAMAT BIBI KHUDAIJAT-UN-NISSA, (1925) I L R 4 Pat. 774.

On principle, the conclusion come to by the learned Judges in this case is unexceptionable, though the difficulties that Holmwood and Sharfuddin, JJ. felt in *Mukta Keshi Dasi* v. *Pulin Behari Singh* (1) are by no means unreal, in view of the words of the section. In the case under review the learned Judges had to consider the effect of the words 'his occupancy right shall be extinguished' along with the fact that the extinction is in favour of the landholder himself. Though it has repeatedly been laid down that an occupancy tenant's relationship towards his landholder is not that of the ordinary landlord and tenant, expressions and analogies from this branch of the law have sometimes been employed; and the common law rule that when a landlord re-enters on breach of a covenant, he holds the demised premises as of his former estate freed from the lease and all incumbrances created by the lessee has obscured the discussion of this question. There is no doubt a principle that in every tenancy there is a limitation inhering in the estate itself as a result of which no interest carved out of the lease can enure beyond the lease itself. The word 'reversion' is more aptly used in connection with leases and the theory that the occupancy right reverts to the landlord may easily prove misleading. This is really a case of merger of the occupancy right in the landholder, which cannot take place so long as there is a mortgage or other impediment outstanding.

In the present case the Court found nothing in the words of the section inconsistent with the application of the rule that, apart from positive law, a person can only acquire such interest as his predecessor had at the time of transfer and that it would not be equitable to defeat prior incumbrances, especially under a system of law which declares that an occupancy tenant's interest is generally both heritable and transferable. The landholder in a case like the present only stands in the position of the Crown taking by escheat and their Lordships accordingly apply to him the rules laid down in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2) and *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam* (3). In S. 22 of the Bengal Tenancy Act, as it originally stood, the words were similar to the present S. 26, and yet the legislature thought fit to expressly save the rights of third

1. (1908) 13 C W N 12. 2. (1859-61) 8 M I A 500. 3. (1866-67) 11 M I A 619.

parties. But the omission so to save them in S. 26 is rather siginificant.

This problem cannot often arise in the same form in the Madras Presidency as there is no provision here corresponding to S. 26 of the Bengal Tenancy Act [*cf.* S. 10(2)]. The question may however come up for discussion in the case of inamdars falling under S. 3 (d) of the Estates Land Act acquiring the occupancy right from the tenant by surrender. It has now been held by a Full Bench (in C R P No. 771 of 1923) that surrender is a mode of acquisition within the meaning of the exception to S. 8. From the very use of the word 'acquires' in the exception, it may well be maintained that it can only be of such interest as the tenant had at the time. But by calling it a surrender there is room for the contention that mesne incumbrances must be held to be swept away. As between landlord and tenant, the English law seems to be in favour of preserving the rights of mortgagees and other persons holding interests in the lease. [See *Doe* v. *Pyke* (4), *Wheaton* v. *Maple and Co.* (5) and *Walter* v. *Yalden* (6)]. Even under the Indian Law, there is no reason why it should be otherwise, and in *Rajah of Ramnad* v. *Ramanathaswami* (7), this view seems to be adopted, as reference is made without disapproval to *Raghunath Singh* v. *William Cox* (8) and a passage from Channel, J's judgment in *Walter* v. *Yalden* (6) that "the law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment". But their Lordships also say that the landlord claims in his own right and not as surrenderee from the tenant and lay stress on the words of S. 111 of the Transfer of Property Act that the tenancy is extinguished by surrender. It is difficult to see how the mortgagee from the lessee can enforce his right against the landlord, if the extinction is real. It may be pointed out that in *Zemindar of Nuzvid* v. *Lakshmi Narayana* (9), it has been held that when an occupancy ryot relinquishes or surrenders his holding, the mortgages are not defeated and their Lordships follow *Chhotalal* v. *Sheopal Singh* (10). But this latter case goes the length of laying down that in such circumstances the ryot cannot surrender or relinquish his holding. This extreme view is however, not supported by the cases which it purports to

4. (1816) 5 M & S 146. 5. (1893) 3 Ch D 48. 6. (1902) II K B 304.
7. (1920) I L R 44 M 514. 8. (1914) 19 C W N 268. 9. (1921) I L R 45 M 47.
10. (1910) I L R 33 All 335.

follow, though in Bengal, S. 86, cl. (6) of the Bengal Tenancy Act goes nearly so far as that, when the mortgage is by a registered instrument.

Even in cases where the prior estate can properly be said to be 'defeated', there is a theory that a person who is '*legitimus dominus pro tempore*' can create encumbrances which cannot be defeated by the subsequent taker. This was mooted in *Maharajah of Bobbili* v. *Zamindar of Chundi* (11) but left open. [See also *Narayan* v. *Parshotam* (12)]. This kind of estate giving powers of disposition to the holder for the time being though the estate itself may be liable to be divested in certain contingencies can rarely occur in England except by agreement. In *Muthuraman Chettiar* v. *Ponnuswamy Udayan* (13) Wallis, C. J. and Seshagiri Aiyar, J. held that such an agreement will not be void and that in such a case the divestor will be bound by the acts of the predecessor, if by the agreement itself his alienations be saved. In the absence of a clause saving alienations, the defeasance may operate to cut down the estate itself to a life estate and defeat all alienations [cf. *Lakshminarayana Nairar* v. *Valliammal* (14)].

Under the Rent Recovery Act of 1865, similar questions arose in this Presidency and as pointed out by Bhashyam Aiyangar, J., in *Ekambara Aiyar* v. *Meenatchi Ammal* (15), the cases resolve themselves into two groups: 1. cases where the tenant refuses to accept a proper patta under S. 10 and similar cases which involve forfeiture of the estate and 2. cases where the occupancy right is brought to sale for arrears of rent. In the latter case, the sale would not, prior to the Estates Land Act, I of 1908 sweep away the prior incumbrances as rent was not then a first charge over the holding. *Rajagopalachari* v. *Subbaraya Mudali* (16) and *Suramma* v. *Suriyanarayana* (17). In cases falling under Group 1, it has been held that the mesne incumbrances are swept away, on ejectment for refusal to accept a patta under S. 10.

THE OFFICIAL RECEIVER *v.* PALANISAMI CHETTY. I L R 48 Madras, p. 751 : 49 M L J 203.

The questions in this case were 1. whether the right of a secured creditor to bring a suit to enforce a mortgage is affected by adjudication of the mortgagor 2. whether an

11. (1910) I L R 35 M 108 : 21 M L J 593. 12. (1896) I L R 22 B 388 (F B).
13. (1915) 29 M L J 214. 14. (1910) I L R 34 M 250. 15. (1903) I L R 27 M 401
16. (1883) I L R 7 M 31. 17. (1918) I L R 42 M 114.

application under S. 53 of the Provincial Insolvency Act operates as stay of the suit on the mortgage. Both the questions were answered in the negative. There does not seem to be any difference of opinion on the question that the mortgagee is entitled to sue to enforce the mortgage security unaffected in any manner by the fact of adjudication [See *Kanniappa Mudali* v. *Rasu Chettiar* (1), *Jagannath Marwari* v. *Kalachand Banersee* (2) and *Mir Hasi Nur Muhammad Khan* v. *Kadir Bux* (3)] though there is a difference of opinion as to whether the Official Receiver is a necessary party. In *Jagannath Marwari* v. *Kalachand Banersee* (2) the Calcutta High Court seems to hold that the joinder of the Official Receiver is unnecessary. That was a case in which the representative of the mortgagor was declared an insolvent. That circumstance cannot make a difference, for the Official Receiver is not the representative of a party for purposes of *lis pendens* and it would seem to be unnecessary to make him a party if at all it is intended to affect him. As owner of the equity of redemption he would be a necessary party and to read the proviso in S. 28 in such a way as to preclude even the necessity for making the Official Receiver a party would seem to be too wide a construction. The contrary view has been taken in *Devaraja Aiyangar* v. *Thirumalasami Naidu* (4).

On the second question, the view of the learned Judges is that an application under S. 53 is a proceeding in bankruptcy and has effect so far as bankruptcy proceedings are concerned but between parties, a decree if passed on the mortgage would stand and therefore the former cannot operate as a stay of the latter. This observation seems to be just and can be reinforced by considering what would follow if the adjudication should, for one reason or other, be cancelled. Obviously, the operation of the decree would stand wholly unaffected. On the other hand, if the bankruptcy proceedings should continue, the decree cannot be executed against the property as since the date of the decree, a competent Court has declared that the mortgage is inoperative against the Official Receiver so far as the property is concerned. That is to say, the Court's power to sell the property so as to bind the Official Receiver is at an end. We had numerous instances of such a result when the dual system of common law and equity prevailed in England.

1. (1924) I L R 47 M 605: 47 M L J 16. 2. (1924) 41 C L J 290.
3. (1913) 24 I C 830. 4. (1915) 32 I C 489.

NAWAB SHUJA-UL-MULK BHADUR v. UMIR-UL-UMRA BAHADUR, (1925) I L R 48 Mad p. 846 : 49 M L J 498.

In this case, the decree directed costs to be recovered from the 1st defendant and if the plaintiff was unable to recover it from him that he might recover them from the income of certain trust property. The question was as to the time limit under S. 48, Civil Procedure Code so far as the trust property was concerned. Mr. Justice Devadoss held that the principle of the Privy Council decision in *Khulna Loan Co.* v. *Jnanendra Nath Bose* (1) applied to the case, Mr. Justice Wallace differing: Mr. Justice Phillips agreed with Mr. Justice Devadoss. At first sight, it might appear that the decision of the Privy Council in *Rameshwar Singh* v. *Komeshwar Singh* (2) is opposed in principle to that in *Khulna Loan Co.* v. *Jnanendra Nath Bose* (1). But on closer examination, it will be found not. Their Lordships are at pains in the latter case to show that no part of the decree was executable. According to their Lordships, the existence of such a decree is a condition precedent to the application of Art. 182. Their Lordships also indicate that Art. 181 might apply to such a situation which gives 3 years from the date when the right to apply accrues. That is the line taken by the Madras High Court in numerous cases dealing with mortgage decrees. The case where the decree is not executable at all, it will be found, is protected under S. 48, Civil Procedure, to this extent that the provision of the section will apply only to the second application and not to the first so that in such a case, a second application might be struck at by the rule but not the first which will be governed by Art. 181 or 182. It might have been argued that the decree against each should be taken as a separate decree though that is not the principle adopted by the Limitation Act except in the case of decrees where the relief against each is given separately distinguishing portions of subject-matter. *Abdul Khader* v. *Ahammad Rowther* (3) says that this principle of the Limitation Act is not applicable to S. 48, Civil Procedure Code.

MUSSAMMAT BIBI KHODAIJATUL KOBRA *v.* HARIHAR, I L R (1925) 4 Pat 688.

This case seems to be literally within the terms of S. 37, cl. (2), Civil Procedure Code, as the Court to which the appli-

1. (1917) 22 C W N 145 (P C). 2. (1920) 40 M L J 1 (P C).
3. (1913) I L R 38 M 419.

cation for execution was made, was *at the time of the filing of the application* the Court that was competent to entertain the suit in which the decree had been passed; but there are nevertheless certain difficulties arising from the decision in *Maharajah of Bobbili* v. *Narasaraju Peda Baliare Simhulu Bahadur* (1) which may be noted. The pronouncement of the Privy Council in that case is to this extent clear and unambiguous, (namely) that after the transfer of a decree under S. 39, Civil Procedure Code, and till the decree is returned under S. 41, Civil Procedure Code, to the extent to which the decree could be executed by it, the transferee Court is the only Court to which an application for execution could properly be made. [See *Jnanendra Nath Ghosh* v. *Kamar Jogendra Narain Sinha* (2)]. The Full Bench in *Seeni Nadan* v. *Muthuswami Pillai* (3) appear to accept the distinction suggested in argument and in Justice Seshagiri Aiyar's referring judgment that when only the territorial jurisdiction of a Court is transferred to another Court, either in whole or in part, the business of the Court which passed the decree prior to the redistribution is not also transferred thereby (See pages 826, 829 and 837) and that therefore *Maharajah of Bobbili* v. *Narasaraju Peda Baliara Simhulu Bahadur* (1) would have no application to such a case. If this be the real distinction, we fail to see how it can fit in with the case under review.

In this case, when the Additional Subordinate Judge's Court which passed the decree in the first instance was abolished, the business of that Court was by law, and in fact, transferred to the third Subordinate Judge's Court. When the Additional Subordinate Judge's Court was re-established, is there anything in law (apart from any special notification) by which the business theretofore pertaining to the 3rd Subordinate Judge's Court can be deemed to be retransferred to the new Court. Otherwise, on the above interpretation of the *Maharajah of Bobbili* v. *Narasaraju Peda Baliara Simhulu Bahadur* (1) the 3rd Subordinate Judge's Court would continue to be the proper Court to execute the decree. (Compare however, *Mouna Guruswami Naicker* v. *Sheikh Mahommadhan Rowther* (4)]. It was held in *Girindro Chunder Roy* v. *Jarawa Kumari* (5) that a transferee Court when it ceases to have territorial jurisdiction

1. (1916) I L R 39 M 640: 31 M L J 300 (P C).
2. (1922) I L R 2 Pat 247. 3. (1919) I L R 42 M 821: 37 M L J 284.
4. (1922) I L R 46 M 83: 43 M L J 713. 5. (1891) I L R 20 C 105.

may either *suo motu* or on application for the purpose, transfer the decree to the Court which has the territorial jurisdiction. Therefore the apparent conflict between S. 37, cl. (2) and *Maharajah of Bobbili v. Narasaraju Peda Baliara Simhulu Bahadur* (1) may perhaps be got over by assuming that on the re-establishment of the Additional Sub-Court the 3rd Sub-Court must be deemed to have transferred the decree to it. The difficulty will then be to reocncile this view with the judgment of the Full Bench in *Seeni Nadan* v. *Muthuswami Pillai* (3); for, if in such a case the business is to be treated as in law transferred to the new Court, there is no reason for holding that when the local jurisdiction is transferred, it ought to be otherwise. Taking the converse of the facts of the present case, what will be the position if after the re-establishment of the Additional Subordinate Judge's Court, the decree-holder should apply to the 3rd Sub-Court itself? In *Tara Chand Marwari* v. *Ram Nath Singh* (6) Maclean, C. J. held that it would continue to have jurisdiction. It does not appear whether in that case the new Additional Court had territorial jurisdiction so as to fall under S. 37, cl. (2). A similar question recently arose in *Rajagopala Pandarathar* v. *Thirupathia Pillai* (7) in the following circumstances. A decree absolute for sale in a mortgage suit had been passed by the Sub-Court of Tanjore and an application for execution of that decree was pending before it. At that stage the jurisdiction over the mortgage properties was by a Government notification transferred to the District Court of West Tanjore. On the strength of an order of the District Court under S. 24, the sale was held by the Sub-Court itself and the validity of the sale was questioned on the ground that the Sub-Court had no jurisdiction. It was argued in answer, that both the Courts had jurisdiction in the matter, the Sub-Court as the Court which passed the decree and the District Court as the Court to which the decree was transferred by operation of law. But their Lordships left that question open, merely referring to *Seeni Nadan* v. *Muthuswami Pillai* (3) to indicate the conflict of decision on the point in this presidency. The Calcutta High Court seems to recognise jurisdiction, at any rate under S. 150, Civil Procedure Code, in both the Courts. [See *Jahar* v. *Kamini Debi* (8), *Udit Narain Chaudhuri* v. *Mactuna Prasad* (9) and

1. (1916) I L R 39 M 640: 31 M L J 300 (P C).
3. (1919) I L R 42 M 821: 37 M L J 284.
6. (1906) 4 C L J 473.
7. (1925) 50 M L J 161.
8. (1900) I L R 28 C 238.
9. (1908) I L R 35 C 974.

Amin-ud-din Mullick v. *Atar Mani Dasi* (10)] though there was some divergence even there in the earlier cases. The distinction suggested in the Calcutta cases, *viz.*, that in such cases the Court which passed the decree is a proper Court for purposes of Art. 182, cl. (5), Limitation Act, though not a competent Court to order sale seems to be a way out of the difficulty and this seems to be also the true effect of the decision in *Seeni Nadan* v. *Muthuswami Pillai* (3).

The second ground on which the decision under notice is rested deserves some mention. From the accident of the new Court being also designated Additional Subordinate Judge's Court, Mullick, J. thinks that it is analogous to a temporary closing of the Court and the learned Judge invokes the further analogy of a vacancy in the Judgeship of a Court in the interval between the leaving of one Judge on transfer and the arrival of another. These analogies, it is submitted, overlook the fact that in such cases the Court is there all the time notwithstanding the temporary absence of the presiding officer and that often arrangements are made for the receipt of papers or the filing of urgent applications. The logical result of his Lordship's view will be that if the period for presenting an application should expire between the abolition of the old Court and the establishment of the new, it can be filed on the day of the establishment of this Court. We do not think there is any warrant for such a conclusion.

---

3. (1919) I L R 42 M 821: 37 M L J 284.
10. (1920) 24 C W N 899.

BIDHYADHAR BACHAR *v.* MANINDRA NATH DAS, I L R 53 Cal. 14.

The majority of the Full Bench have held in this case that when a suit for the recovery of land and mesne profits *pendente lite* is brought in a Court of limited jurisdiction and the matter is within the pecuniary limits of the Court's jurisdiction when the suit is laid, the Court can award mesne profits *pendente lite* even though the amount when assessed is beyond its pecuniary limits. This has been well understood to be the law in Madras, Patna and Allahabad and it looks somewhat strange that in spite of the inclination of the referring Judges in this case the point was not considered as arguable at the bar before the Full Bench. Indeed after the searching examination which the question received at the hands of the late Sir K. Srinivasa Aiyangar sitting with Justice Ayling in the Order of Reference to the Full Bench in *Kannayya Chetti* v. *Venkatanarasayya* (1) to which the Full Bench could not add anything, one should have thought that there was little to be said for the contrary view. The principle of this decision was affirmed as early as *Madho Das* v. *Ramji Patak* (2) which was followed later in *Sudarshan Shastri* v. *Ram Prasad* (3). Again the Patna High Court in *Dinanath Sahai* v. *Musst. Mayavati Kuer* (4) decided the very question that arose in this case on much the same grounds as those of B. B. Ghose, J. in his leading judgment in this case. The anamolous situation which resulted in the facts of this case is sufficient to show the difficulty in the way of accepting the view in *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose* (5). The decision in the case under notice having restored uniformity in the law as to award of future mesne profits, we would proceed and venture to submit that even in cases of past mesne profits where the plaintiff can only put a tentative valuation in his plaint a Court of limited pecuniary jurisdiction can award a sum over its pecuniary limits when after assessment it is found that the amount exceeds its limits, at any rate in cases where the plaintiff has not fraudulently undervalued his claim for past mesne profits. In Madras the tentative valuation is not open to objection at all by the other side; cf. *Ramiah* v *Ramaswami* (6)

1. (1916) I L R 40 M 1.
2. (1894) I L R 16 A 286.
3. (1910) I L R 33 A 97.
4. (1921) 6 Pat L J 54.
5. (1910) I L R 43 C 650.
6. (1913) 24 M L J 233.

and *Arunachalam Chetti* v. *Rangasami Pillai* (1); but this view is not accepted by all the other High Courts. Whether the nature of a suit for mesne profits is one for money under S. 7 (1) of the Court Fees Act or one for accounts falling under S. 7 (iv) (f) it can only be tentatively valued by the plaintiff as the property in the hands of the trespasser. Again it seems to be clear from S. 11 of the Court Fees Act, that the Court can award a sum in excess of the plaintiff's original claim; and it is only with a view to protect the public exchequer, the plaintiff is bound to pay the Court-fee on the excess before execution. The Order of Reference in *Kannayya Chetti* v. *Venkatanarasayya* (2) expressly decides the case of past mesne profits as also the case of a suit for accounts. But when once the principle is recognised as was done by the majority of the Full Bench in this case, that if the suit when laid is properly within the jurisdiction of the Court of limited pecuniary jurisdiction, all reliefs could be finally and effectively given to the plaintiff in the suit even though they may exceed its pecuniary limits, the decisions in *Nand Kumar Singh* v. *Bilas Ram Marwari* (3) and *Gopal Singh* v. *Indra Kumar Hazra* (4) relating to suits for mesne profits prior to suit and suits for accounts would seem to require reconsideration. Otherwise the same anamoly is likely to happen in those cases as resulted in the facts of this case.

NARESH CHANDRA BOSE v. KRISHNA BHABINI DASI, I L R 53 Cal 42.

There can be no question that when the decree in a suit does not provide for interest on the decree amount, the executing Court cannot award interest on the amount in execution. But in this case the Court went further and expressed an opinion which was not necessary for the decision of the case that interest on the decree amount might be recovered in a separate suit by way of damages for detention and reliance was placed for this proposition on the decision of the Privy Council in *Seth Gokul Das Gopal Das* v. *Murli and Zalim* (5). If the question had arisen in England it would have been held under S. 17 of the Judgments Act of 1838 and O. XLII R. 16 of the Rules of the Supreme Court, that interest would be

1. (1914) I L R 38 M 922.
2. (1916) I L R 40 M 1 (F B).
3. (1917) 3 Pat L J 67.
4. (1909) 13 C W N 493.
5. (1878) I L R 3 C 602.

recoverable in execution itself at 4 per cent. per annum or at the rate agreed in the contract, if the contract provided that interest at a different rate is payable on the amount of the judgment. We have no corresponding provision in the statute law here; and such provision that we have is to the contrary effect. Prior to the enactment of the second clause of S. 209 of the Code of Civil Procedure of 1882 which was introduced by S. 20 of Act VII of 1888, there were decisions to the effect that where the decree did not provide for interest after its date, the executing Court could not grant it in execution. See *Sadasiva Pillai* v. *Ramalinga Pillai* (1) and the cases referred to in it. But this enactment goes further and provides that if the decree does not allow interest after its date, it must be deemed to have been refused. Even if it had stopped there, a subsequent suit for the interest on the decree amount would be barred on the principle of *res judicata;* but the section goes still further and provides in terms that no separate suit shall lie for interest on the decree amount. In this connection, it is difficult to see whether it will make any difference that interest on the decree amount detained is claimed in the subsequent suit by way of damages or otherwise. All the same, the principle of S. 34 (2) of the present Civil Procedure Code corresponding to the second clause of S. 209 of the Code of 1882, would seem to apply and bar a subsequent suit for interest. Again, we are not sure that the fact that interest is due in the case under notice from the dates of the various instalments under the decree and not from the date of the decree itself would make any difference in the application of S. 34. Anyhow, the authority of this case would have undoubtedly been greater if it had considered the effect of the section and examined whether in the light of that provision, the case in *Seth Gokul Das Gopal Das* v. *Murli and Zalim* (2) can be considered good law at the present day.

DWIJENDRA NATH MULLICK v. GOPIRAM GOVINDARAM, I L R 53 Cal. 51.

This is a case on the border line and the learned Judges proceeded to decide on the facts whether there was an agreement to stifle a prosecution rendering invalid the mortgage executed by the person who originally misappropriated the amount and his brother who was in no way under an antecedent

---

1. (1875) L R 2 I A 219 (P C). 2. (1878) I L R 3 C 602.

liability to the mortgagee. In all such cases it is somewhat difficult to get out of the feeling that an honest man is attempted to be cheated of his money by this defence of illegality and it is no wonder that Judges try to help the unfortunate plaintiff from the rigorous legal consequences of the transaction, if there is no moral guilt on his part, as in this case. A prosecution for criminal breach of trust was actually pending in the case against one of the defendants and he and his brother agreed to execute a mortgage for a part of the sum mis-appropriated if the criminal case pending were withdrawn. Judged by the rule laid down by Lord Lyndhurst in *Egerton* v. *Brownlow* (1) that "any contract or engagement having a tendency however slight to affect the administration of justice is illegal and void," one cannot be sure whether the mortgage in this case was not illegal and void. Again the brother joining in the mortgage would seem to take it out of the class of cases where there is a pre-existing liability on the part of the accused where it has been held that the security is for the pre-existing liability and the hope that the prosecution will not be proceeded with is immaterial. A somewhat similar case came up before the Patna High Court in *Adhikanda Sahu* v. *Jogi Sahu* (2) where also the same conclusion was reached with some hesitation by the learned Judges. The main difference between that case and the present is that in the Patna case, a prosecution was not actually pending but a sanction to prosecute had been obtained by the plaintiff. Reference may usefully be made to a critical note on that case in *Adhikaida Sahu* v. *Jogi Sahu* (3) where the decisions bearing on the subject have been noticed and reviewed.

---

1. 4 H L C at 163.
2. (1921) I L R 1 Pat 164.
3. 44 M L J (N I C) p. 1.

VENKATACHARYULU *v.* VENKATASUBBA RAO, I. L. R. 48 Mad. 821 : 49 M L J 313.

The question in the case was whether there is a charge in favour of the lessor in respect of a premium payable under a document of perpetual lease. On principle, it is difficult to see why there should not be a charge for premium quite as much as for the purchase money, but it is too much to expect either principle or logic except to a very limited extent, in English Law especially. For instance, if premium is a charge, it is difficult to see why rent also should not be a charge. But rent is not a charge either in England or apart from Statute in India. [For India see *Padakannayya* v. *Narasimma* (1) and *Rajagopalachari* v. *Subbaraya Mudali* (2)]. The Transfer of Property Act does not give a charge for premium and except where there has been a definite course of decisions to the contrary, that should govern leases as a matter of equity and good conscience.

But there is another aspect of the case which has not been considered. Now that kudivaram and melwaram are recognised as two distinct interests, where there has been no merger of the two interests, there is much to be said for the view that premium would be part of the purchase-money. In cases within S. 25 of the Estates Land Act, the provisions of that section should govern and there could be no question of charge. In other cases kudivaram interest is assimilated in this country to perpetual lease-hold interest and the rules as to leases should govern such cases. If the creation of a kudivaram or ryot's interest is possible, one should think that the creation of such an interest would be a *sale* and not a lease at all. Kudivaram proper is not lease-hold interest—it is ownership itself. The relation between the kudivaramdar and the melwaramdar is not one of tenant and landlord, but of an owner and an owner. The failure to recognise this fundamental fact has been the curse of the revenue history of this country and is colouring the enunciation of law.

SALAKSHI AMMAL *v.* DORAIMANIKKA NADAN I. L. R. 48 Mad. 827 : 49 M L J 341.

In this case, a Hindu father bequeathed certain of his self-acquired property to charity constituting his sons trustees and giving them direction not to partition the properties.

1. (1886) I L R 10 M 266.   2. (1883) I L R 7 M 31.

After a time, the sons divided the joint family properties but left these properties alone on the ground that they have to be administered according to the will. The question was as to whether on the death of one of the brothers and his son, his widow was entitled to the management along with the other brother. Their Lordships hold, not. Incidentally the question is discussed as to whether the trusteeship was held by them originally as members of a joint family or as tenants-in-common. Their Lordships hold, following the ruling laid down in *Nagalingam Pillai* v. *Ramachandra Thevar* (1) that the sons must be presumed to hold the office as members of a joint undivided family. In *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (2) their Lordships of the Privy Council indicate the difference of opinion between the various Courts on this matter and say that they would have to examine for themselves the text of the Mitakshara if the question directly arose before them. That leaves the various High Courts where they were and the learned Judges in this case rightly hold that the course of decisions in Madras is unaffected by the decision of the Privy Council. The presumption in question does not seem to stand alone. The presumption as to grant to women and that in respect of putravaksam grants in Malabar seem to be involved in the fate of the presumption in question. In the partition between the brothers, the office being left in *status quo ante,* their Lordships held that the office survived to the brother and the widow could not come in. Their Lordships apparently have some doubt as to the correctness of *Meenakshi Achi* v. *Somasundaram Pillai* (3), at any rate they were not prepared to accept its correctness without further examination, that is to say, as to whether it is possible to have a partition of the office so as to bring in widows. In cases where there is an express or implied prohibition in the deed or document constituting the trust, the partition would seem to be out of the question. Where the trusteeship is only by implication held by the family, the further implication that when the family becomes divided, the course of devolution should undergo a variation, is not excluded.

BELI RAM AND BROTHERS *v.* RAM LAL, I L R 6 Lah. 380. One of the questions raised in this case related to the effect of an injunction on the validity of an alienation made

1. (1901) I L R 24 Mad 429 : 11 M L J 210.
2. (1923) I L R 45 All 596 (P C).
3. (1920) I L R 44 Mad 205 : 39 M L J 403.

contrary to the terms of the injunction by the person enjoined thereby. On the finding that the alienor, in this case, was not the person against whom the injunction was directed, the other question did not really arise for decision. It is well established, that equity acts *in personam* only and that an injunction binds only the parties to the injunction and those that aid or abet the party enjoined, in the breach of the injunction with notice of the injunction. [See *Seaward* v. *Paterson* (1)]; *Scott* v. *Scott* (2). It accordingly follows that the penalty for breach of the injunction cannot be the avoidance of the alienation but only the punishment provided by O. 39, R. 2, Civil Procedure Code. In *Puzhakkal Edom* v. *Mahadeva Pattar* (3), a karnavan contrary to the terms of an order of Court restraining him from borrowing money raised loans for purposes binding on the tarwad and it was held that notwithstanding the injunction order, the debt (if otherwise proper) was binding on the tarwad.

This question has sometimes arisen with regard to the validity of marriages celebrated in defiance of an order of Court. The Courts have held that the marriages are not thereby invalidated. Reliance has no doubt been placed on the doctrine of *Factum Valet* but it has also been recognised that injunctions do not nullify acts done in defiance of them [*Bai Diwali* v. *Moti Karson* (4)]. The persons guilty of the breach and those that connived at it will no doubt be guilty of a contempt of Court. [*Subhadra Koer* v. *Dhasadhari Goswami* (5)]. By S. 43, cl. (4) of the Guardian and Wards Act, O. 39, R. 2, C. P. C., is made applicable to certain cases and under S. 44 of that Act, a guardian is liable to imprisonment and fine, if he should remove the ward outside the jurisdiction of the Court, without obtaining its permission under S. 26. The question does not appear to have arisen as to what the effect of the injunction will be, if the breach be in favour of a person who has notice of the injunction. It is not clear if their Lordships had this in mind when, at the end of their judgment they advert to the fact that the alienees were "*bona fide* purchasers for valuable consideration without notice of any fraud or collusion on the part of the vendor."

MC. DONNELL *v.* KING-EMPEROR, I L R 3 Rangoon 524.

At the time that this decision was given, the Madras High Court had not abandoned its view that notwithstanding the

1. (1897) 1 Ch 545.
2. (1913) A C 417 at 459.
3. (1917) 35 M L J 96.
4. (1896) I L R 2 B 509.
5. (1911) 15 C L J 147.

enactment of S. 499 Indian Penal Code, the English doctrine of absolute privilege was available here. The learned Judges accordingly purport to dissent from the Madras view and follow that of the other High Courts. But this Court also has since laid down that so far, at any rate, as criminal proceedings are concerned, S. 499, Indian Penal Code, must be taken to be exhaustive, (*See* Criminal Revision Case No. 490 of 1925) though, in form, the Full Bench purport to leave the position of advocates alone. The rigour of this narrower view is however considerably softened in its practical application by the suggestion that it must be presumed that the Advocate's remarks were made on instructions and in good faith, that he was not actuated by any malice or private motive in making them and that to "displace the presumption of good faith, there must be convincing evidence that the pleader was actuated by an improper motive personal to *himself* and not by a desire to protect or further the interest of his client in the cause

---

HARGOBIND-KISSHAN CHAND *v.* HAKIM SINGH, (1925) I L R 6 Lah. 548.

This case takes the stricter view that the Court has no power to refuse a decree-holder's application for arrest of the judgment-debtor and direct him to proceed in the first instance against the property of the judgment-debtor as held in *Bahadur Khan* v. *Viroo Mal* (1). The same strict view appears to have been taken by Schawabe, C. J., in an unreported case (referred to by Kumaraswami Sastri, J., in *Peruri Suryaprakasam* v. *P. I. Muniswami Chetty* (2) but there is much to be said in favour of the more liberal view adopted by Kumaraswami Sastriar, J., in the last mentioned case, especially having regard to rules 37 and 40 of O. 21 Civil Procedure Code, which are not referred to by the learned Judges in the case under notice. It is one thing to say that the Court has no power to postpone execution against the person of the judgment-debtor and a different thing to say that the Court should afford every help and facility to the decree-holder to realise the fruits of his decree and that it should not lightly refuse his application to arrest the judgment-debtor. The latter view will be sufficient to meet all the considerations adverted to by the learned Judges of the Lahore High Court.

---

1. (1915) 29 I C 152. 2. (1924) 20 L W 175.

RAMA RAJA THEVAR *v.* PAPAMMAL, I L R 48 M 805.

Two questions of Hindu Law arose in this case first as to a concubine's right of maintenance and secondly whether she is entitled to residence. On the former question, it was held following the earlier case in *Panchapagesa Odayar* v. *Kanaka Ammal* (1) that she was entitled after the death of the paramour provided she satisfied certain conditions. That is to say, she should be a woman continuously and exclusively kept and secondly she should remain chaste after the death of the paramour. A further condition that she should be the mother of illegitimate children is noticed by Mr Justice Spencer but Mr. Justice Ramesam recognises only the two conditions referred to by us. We do not think there is any justification for the imposing of such a further condition. The fact that the duty is imposed on the sovereign—who would take in the case of a sudra, only in the absence of an illegitimate son clearly points to the contrary.

On the second question, though there is no discussion their Lordships would seem to accept the argument of Mr. Ramachandra Aiyar that maintenance includes residence.

In the case of *Avaruddha stris,* they are members of the family really and as such the general prohibition of the alienation of residential house on which the right of residence of the widow is based would seem to justify the recognition of the right of residence of the concubine as well—at any rate of a concubine who was being treated as a member of the family.

SUNDARASIVA RAO *v.* VRYYAMMAL, I L.R. 48 M. 933.

What is the effect of a surrender on alienations effected by the widow before the surrender was the question in this case. In *Kottapalli Subbamma* v. *Jatavallabha Subramanyam* (2) Sadasiva Aiyar and Napier, JJ. held that the alienations must stand good during the widow's lifetime. But their Lordships' view was coloured largely by the then prevailing view as to the effect of adoption in similar circumstances. Two views are possible—either, having made alienations, she is disabled from accelerating the estate of the heir "by conveying absolutely and destroying her life-estate" or by "withdrawing her own life-estate" or her surrender must

1. (1917) 33 M L J 455.
2. (1915) I L R 39 M 1035: 30 M L J 260.

be taken subject to her alienations. Logically, the former seems more satisfactory. Discussion on parallel lines has gone on as to the tenant's right to surrender after creating incumbrances on the land. In the case of leases, the intermediate alienations are saved but the surrender is upheld. Surrender in the case of the widow cannot be assimilated to alienation as surrender in the case of the tenant can be, from the difference in the nature of the respective interests of the reversioners in the two cases. The law as to surrender is largely a creation of Courts and it may, as Mr. Justice Kumaraswami Sastriar observed in *Vaidyanatha Sastri* v. *Savithri Ammal* (3) "be hedged in by appropriate limitations dictated by Justice, Equity and Good conscience." From that point of view, stare decisis is perhaps be safest rule for the guidance of Courts in this matter.

MANAVALAN *v.* PARRY AND CO., I L R 48 Mad. 815.

On the finding that the subject-matter of the two leases in the case was different, the further conclusion followed that the taking of the second lease did not involve the surrender of the first. But if the subject-matter was the same, it is much to be doubted whether the refinements suggested by Mr. Justice Ramesam are admissible (under the English Law, apparently they are not) having regard to the illustration to S. 111 which seems to accept the English principle to the full.

BANSILAL ABIRCHAND *v.* GHULAM MAHBUB KHAN, I. L. R. 53 Cal. 88 (P. C.).

In this case the principal debtor and the surety were apparently resident in the Nizam's Dominions at the time of the contract and at the date of suit and it is said that the creditor had a place of business at the date of suit in Secunderabad, which is an adjoining British Contonment. It is not clear from the facts as set out in the judgment whether at the date of contract the creditor was also resident in the Nizam's Dominions or not. The question arose whether under these circumstances a suit against the principal debtor and the surety could be brought in the British Court relying on the common law rule that in the absence of a contract express or implied as to the place of payment, the debtor has to seek the creditor and pay him wherever he may be. Their Lordships have

3. (1917) I L R 41 M 75: 33 M L J 387 (F B).

held that even if the common law rule is applicable to India,—which they have left open—it has no application to the present case, as the creditor was outside the realm which is presumably the Nizam's Dominions, and the rule applies only when the creditor is within the realm. The leading authority on the applicability or otherwise of the rule to cases where the creditor is abroad is the case of *Fessard* v. *Mugnier* (1) where the creditor was in Paris and the debtor contended he was absolved from tendering to the creditor as he was outside the realm of England. Erle, C. J. with the concurrence of his colleagues pointed out that the rule applied also to cases where the creditor was abroad, except where the creditor was in England at the time of the contract and went abroad afterwards, in which case the tender need not be made to the creditor abroad. If therefore in the present case, the creditor was within the Nizam's Dominions at the time of the contract but went into Secunderabad later, the suit would not have been entertainable by the British Court, as the debtor would not in that case be bound to come out of the Nizam's Dominions into British territory to pay the money. But, if, on the other hand, the creditor was at Secunderabad itself on the date of the contract, we doubt, whether in that case, on the application of the common law, the debtor might not be bound to tender the amount at Secunderabad.

On the other question which their Lordships have left open, as to the applicability of the common law rule itself to this country, opinion in the various High Courts is divided. A Division Bench of the Bombay High Court of which Sir Lawrence Jenkins was a party held in *Puttappa* v. *Virabhadrappa* (2) that the common law rule has no application in this country in the face of the express provision in S. 49 of the Indian Contract Act. But there is a decision the other way in *Motilal* v. *Surajmal* (3). In Madras, the common law rule has been considered to be applicable in *Raman Chettiar* v. *Gopalachari* (4) although it was held that it would not entitle the creditor to sue in his place under the terms of S. 17 of the Civil Procedure Code of 1882. It is not clear what the learned Judges would have held under S. 20 (*c*) of the Code of 1908. In Allahabad, the application of the common law rule has been recognised in *Sri Narain*

1. 18 C B (N S) 286.
2. (1905) 7 Bom L R 993.
3. (1904) I L R 30 Bom 167.
4. (1907) I L R 31 M 223.

v. *Jaggannath* (5) and *Bangali Mal* v. *Firm Ganga Ram Asharfi Lal* (6) although the effect of S. 49 of the Contract Act is not noticed in the judgment. The Chief Court of Lower Burma has held in *Yar Mahomed Khan* v. *Amir-ud-din* (7) that the common law rule is in force here and that there is nothing inconsistent with it in S. 49.

While we are on this point, it is perhaps interesting to refer to the rule of English common law as to place of performance of contracts where there is no express or implied agreement as to the same. The rule that the obligor has to find the obligee is not restricted to the case of payment of money only. See *Fowler* v. *Midland Electric Coporation for Power Distribution Limited* (8) and the cases collected in Halsburry's Laws of England Vol. VII, pp. 416, 417. The rule, however, does not apply to cases where things ponderous have got to be delivered in which case, the obligor has to ask the obligee to fix a place for performance and is not bound to carry them wherever the obligee may happen to be for the time being. This rule is similar to what we have in S. 49 of the Contract Act. Again, even if it is payment of money, under the common law, it need not always to the obligee wherever he may happen to be. For instance if it is rent, it is sufficient if the tenant is present on the demised premises to pay the amount to the landlord and the landlord could not distrain afterwards. There is however, a further distinction that on a covenant for payment of rent, tender on the demised premises is insufficient and should be made to the landlord wherever he may be. *Haldane* v. *Johnson* (9). So that, it is only in case of payment of money in gross, as it is called, that the debtor is bound to seek the creditor and pay him wherever he may be. When the question comes to be discussed fully in this country it will have to be considered whether all these technical distinctions should be observed here.

---

5. (1917) 41 I C 890. 6. (1922) 71 I C 431.
7. (1913) 20 I C 683. 8. (1917) 1 Ch. 656.
9. 8 Ex 689.

SARDARI MAL v. HIRDE NATH, I. L. R. 6 Lah. 384.

The rule enacted in O. 2, R. 2 is a complement to the rule of constructive *res judicata* enacted in Exp. IV to S. 11 of the Code; but to the extent to which the bar under the former goes further than is involved in the rule of *res judicata*, the policy underlying O. 2, R. 2 has sometimes been adversely commented on. It has also been recognised that the literal enforcement of O. 2, R. 2 may lead to hardships which were perhaps not contemplated by the law and ways have been found to minimise the hardship. For instance, it has been held that the rule has no application to cases, in which, at the time of the institution of the former suit the plaintiff had no knowledge of the facts on which the second suit is based. [*Amanat Bibi* v. *Imdad Husain* (1), *Gora Chand Haldar* v. *Basanta Kumar* (2) and *Batul Kunwar* v. *Munni Lal* (3)]. Again, the rule has not been applied to cases in which the Court in which the former suit was laid was not competent to grant the relief claimed in the later suit. [*Subba Rao* v. *Rama Rao* (4), *Pattaravy Mudali* v. *Audimula Mudali* (5), *Narasinga Rao* v. *Venkatanarayana* (6) and *Ram Harakh* v. *Ram Lal* (7). *Cf*. however *Basavana Gowd* v. *Doddalingappa* (8)]. But even within the limits within which Courts have been prepared to apply the rule, there has been considerable difficulty in determining its application to particular cases on account of difference of opinion as to the precise significance of the expression "cause of action," which has undoubtedly been differently defined for different purposes and in different contexts. In view of the observations of the Privy Council in *Chand Kour* v. *Partab Singh* (9), we must, for the purposes of this rule also, interpret the expression as having "no relation whatever to the defence which may be set up by the defendant" nor depending "upon the character of the relief prayed for by the plaintiff." In their Lordships' words, "it refers entirely to the grounds set forth in the plaint as the cause of action or to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour".

Judged in this light, we are not sure if the decision under notice can be regarded as based upon unquestionable ground.

1. (1888) I L R 15 Cal 800 (P C).
2. (1911) 15 C L J 258.
3. (1910) I L R 32 All 625.
4. (1867) 3 M H C R 376.
5. (1870) 5 M H C R 419.
6. (1892) I L R 16 Mad 481.
7. (1916) I L R 38 All 217 at 221.
8. (1923) 44 M L J 652.
9. (1888) I L R 16 Cal 98 (P C)

A plaintiff with a contract of sale in his favour first sued for an injunction restraining the defendant from carrying out a proposed sale to another of the same properties and that suit was dismissed on the ground that he was not entitled to an injunction as he could have asked for specific performance [*Vide* S. 56, cl. (*i*), Specific Relief Act]. When he next sued for specific performance accordingly, he was met with a plea under O. 2, R. 2. The case is fairly analogous to another class of cases where a former suit for declaration having been dismissed under the proviso to S. 42 of the Specific Relief Act, a subsequent suit for possession is accordingly brought. The course of decisions in this latter class of cases has no doubt been in favour of the maintainability of the second suit, notwithstanding O. 2, R. 2 [see *Sayed Siliman Saib* v. *Bontala Hasson* (10)] but strong reasons in favour of a different view are clearly set forth in the judgment of Karammat Hussain, J. in *Bande Ali* v. *Gokul Misir* (11) (though the former suit in that case was one for an injunction and not for a mere declaration). As was pointed out by the Appellate Bench in that case, the inapplicability of the bar under O. 2, R. 2, to such cases has to be sustained more on the ground of stare decisis, than on strict grounds of logic or principle. The question was raised in Madras in *Syed Siliman Saib* v. *Bontala Hasson* (10) where it was held that O. 2, R. 2, did not apply, but the judgment in that case can by no means be said to be very instructive. The general trend of decisions has been to hold that the later suit for possession is not based on the same cause of action as the earlier suit for declaration or injunction. Where the circumstances entitling the plaintiff to claim possession arose subsequent to the institution of the earlier suit, it is easy enough to maintain this position [*Singa Reddi* v. *Subba Reddi* (12)]; but where the same facts have existed all along, it is not easy to say whether the mere omission of the plaintiff to refer to some of them in his former plaint will justify the Court in holding that by reason of the difference in the relief sought for in the two suits, they are based on different causes of action. A further question will arise in respect of cases where the facts are mis-stated, as for instance, where with a view to get an injunction in the earlier suit the plaintiff alleges that he is in possession, but it is afterwards found by the Court that he was not in possession. A distinction has been suggested

10. (1913) I L R 38 Mad 247 : 25 M L J 125. 11. (1911) I L R 34 All 172.
12. (1915) I L R 39 Mad 987: 31 M L J 48 (F B).

in this connection between cases where the omission or mis-statement is wilful and those where it is due to ignorance or inadvertance. But we venture to doubt whether and how far such refinements are warranted, by the language of the rule. [cf. *Munshee Buzloor Rahim* v. *Shumsoonnissa Begam* (13) and *Syed Abdulla* v. *Harkishen Singh* (14)]. It is worth noting that in O. 2. R. 2, the word 'intentionally' is inserted before the word 'relinquishes' and does not govern the words 'omit to sue.' [See, however, *Rama Harakh* v. *Ramlal* (7) where Walsh, J., thinks 'omit to sue' involves intention].

In the case under notice, the learned Judges do not base their decision even on the ground that the causes of action in the two suits are different. They prefer to leave this question open and rest their conclusion upon the ground that as the former suit sought a relief which the plaintiff was not entitled to get and "which the Courts could not grant him, he is not debarred from subsequently bringing a suit in respect of a relief which the Courts can grant him." [See also Tyrrell, J., in *Ram Sewak* v. *Nakched* (15) for an echo of this reasoning].

If the relief was one beyond the competence of the Court, in which the former suit had been instituted, the case may atleast come within the course of decisions already referred to. But it seems to us open to doubt whether the mere fact that in the circumstances of a particular case, a plaintiff was not entitled to a particular relief, will justify the introduction of a similar exception. [Cf. *Abdul Hakim* v. *Karan Singh* (16) where again a possible distinction is suggested between cases where a wrong relief was first asked for under a misapprehension and those in which the plaintiff was even at the time of the first suit aware of the relief to which he was entitled]. Suppose, on the other hand, an injunction had somehow been given in the former suit and the plaintiff next sued for specific performance as well, for obviously the injunction cannot by itself secure the property to him. We do not know how the learned Judges would in that case, have dealt with the plea under O. 2, R. 2.

It may be useful here to refer to a decision of the Privy Council which, judging from the report, does not appear to have been brought to the notice of the learned Judges. In *Rangayya Goundan* v. *Nanjappa Rao* (17), there was an

7. (1916) I L R 38 All 217 at 221. 13. (1867) 11 M I A 551 at 605.
14. (1905) 2 C L J 490. 15. (1882) I L R 4 All 261 (F B).
16. (1915) I L R 37 All 646. 17. (1901) I L R 24 Mad. 491 (P C).

agreement for sale of a coffee estate under which the vendee, claiming that he had been put in possession but that such possession had since been disturbed by the vendor, sued in the first instance for recovery of possession under S. 9 of the Specific Relief Act, for damages for disturbance and for an injunction to protect his possession. The claim for possession and for damages was dismissed but a qualified injunction was granted restraining the "vendors from working the estate otherwise than as the vendees may appoint." The purchaser next sued for specific performance but this suit was dismissed by the Privy Council as barred by S. 43 of the Code of 1882 (corresponding to the present O. 2, R. 2). Their Lordships say that the agreement was the basis of the claim in both the cases, in one of the claim for possession and damages and in the other of the claim for transfer of the estate.

It is well-settled that the application of O. 2, R. 2, depends not upon the nature of the *decision* in the former suit or even upon the fact of a decision; the bar arises from the mere fact of its *institution*. It is on this ground that it has been held that on a withdrawal of a former suit without liberty to bring a fresh suit, a second suit will be barred, not merely in respect of reliefs claimed in the first suit but also in respect of what might have been claimed therein. [Cf. *Syed Abdulla* v. *Harkishen Singh* (14)].

---

14. (1905) 2 C L J 490.

RAGHUNATH RITHKARAN *v.* THE IMPERIAL BANK OF INDIA, LTD., I. L. R. 50 Bom. 49.

In this case, the Imperial Bank presented for payment a hundi under a mistake to a person who was not the drawee and the latter without satisfying himself that he was the drawee paid under a mistake the amount presumably under the impression that the Bank would not present it to him for payment unless he was the drawee. He found out the mistake several months later and gave notice to the Bank claiming back the amount over two years later. The question was whether he could recover the amount and the learned Judges have held in the negative relying mainly on English decisions. There being no provision in the Negotiable Instruments Act applicable to the case, it falls under the general provisions of S. 72 of the Contract Act which enacts that a person to whom money has been paid or anything delivered by mistake must repay or return it; and it has to be noticed that no limitations are imposed by the section on the right of recovery and no distinction has been made between the case of money or any other thing which is paid or delivered by mistake. Under these circumstances, it is not clear whether the Indian legislature did not intend to introduce a simple rule in this country applicable to all cases and differing to some extent from the English rule which has a number of qualifications. To refer to only some of them, it has been held in England that where there is a mutual relation between the parties, the party paying the money, though under a mistake of fact, is disentitled from recovering. Thus in *Cocks* v. *Masterman* (1), referred to by the learned Judges, it was held that a banker who had paid money on a forged cheque and had not given notice of forgery was held disentitled to recover the money back. Coyajee, J., in the case under notice seems to think that the stringent rule laid down in this case would not be applicable here. The English rule was stated even more widely in *London and River Plate Bank* v. *Bank of Liverpool* (2). But in view of the observations of the Privy Council in *Imperial Bank of Canada* v. *Bank of Hamilton* (3), it is not certain how far the Privy Council was prepared to follow them. Where, however, there is no such mutual relation between the parties or no duty cast on the party paying the money, the delay on his part in discovering the mistake

1. (1829) 9 B & C 902. 2. (1896) 1 Q B 7.
3. (1903) A C 49.

would not disentitle him from recovering even though the other party might be prejudiced by the delay as pointed out in *Durrant* v. *Ecclesiastical Commissioners* (4). referred to by the learned Judges in this case. We venture to think that this relationship or duty referred to must be one antecedent to the payment of money and there was no antecedent relationship in the case under notice as the plaintiff was not the drawee under the hundi. The circumstance that the defendant who received the money under mistake was a bank would not seem to make any difference for this purpose. Cf. *Kerrison* v. *Glyn, Mills, Currie and Co.*, (5). Again, the existence of the means of ascertainment of the real state of things by the plaintiff that he was not the drawee of the hundi would not take the case outside the provisions of S. 72 of the Contract Act, or the analogous rule of English law as it is well settled that for this purpose, even means of knowledge or carelessness in omitting to use diligence in inquiring into the fact is immaterial. See *Kelly* v. *Solari* (6) approved in *Imperial Bank of Canada* v. *Bank of Hamilton* (3). Coming to the Indian Cases it has been held in *P. Ramiah and Co.* v. *Sadasiva Mudaliar and Bros.* (7) that a change of position of the defendant is not always material in denying relief to plaintiff who paid under mistake where the learned Judges have doubted the prior decision in *K. M. P. R. Firm* v. *The Official Assignee of Madras* (8) to which one of them was a party and which placed a restricted and somewhat unnatural interpretation on the terms of S. 72. While on S. 72 it may be remembered that the section does not in terms draw a distinction between cases of mistake of fact and those of mistake of law which is well recognised in England; but it may well be doubted whether the distinction is not intended to be kept up here by the legislature.

SHIVANATHA PRASAD *v.* TULSHI RAM, I. L. R. 48 All. 1.

The expression "illegal and immoral" as used in connection with Hindu Law has a much wider connotation than it has under the ordinary law; so that while debts strictly illegal and immoral would not be enforceable at all, a large number of these would, though not enforceable against the son or his

3. (1903) A. C. 49.
4. (1880) 6 Q B D 234.
5. (1909) H L 81 L J (K B) 465.
6. (1941) 9 M N W 54.
7. (1925) I L R 48 M 925 : 49 M L J 228.
8. (1922) 43 M L J 142.

interest in ancestral property would be enforceable against the father personally and consequently as against his self-acquired property as well as his interest in the joint family property. *Suraj Bansi Koer's case* (1) is an instance of such debt and the father's share alone was held to pass to the purchaser In the case of such debts if the father should die before his share is attached, and he also happens to leave no self-acquisition, the creditor will go without remedy. All this is elementary law but reporting proceeds in India—specially in Allahabad—on the footing that even elementary law requires to be periodically restated so that there may be no mistaking about it or that a recent authority might be produced when called for

---

FAQIR CHAND *v.* SANT LAL, I. L. R. 48 All. 5.

It is now settled law that attachment creates no interest but only prevents alienation. The decision in *Suraj Bunsi Koer* (1) was passed at a time when it did create a charge and there was also the further circumstance that an order for sale had been made. Nevertheless it has been uniformly held by Courts that attachment prevents survivorship. The effect of attachment is thus stated by Lord Watson: "Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution." *Madho Prasad* v. *Meherban Singh* (2). Attachment has the same effect as a declaration of intention to divide. In effect, the Court is exercising that power on his behalf so as to render his assets available for distribution to the creditors. The sale conveys the interest as existing at the date of the attachment but, of course, it is only a conditional exercise of the option—conditional in the sense that if the attachment does not materialise in a sale, it leaves the *status quo ante* undisturbed.

KASHI PRASAD *v.* MATHURA PRASAD, I. L. R. 48 All 6.

The Allahabad High Court would not take [see *Mashi-alun-nissa* v. *Rani* (3)] as the Madras High Court would,

1. (1879) I L R 5 Cal 148.
2. (1890) I L R 18 Cal 157 at 161. 3. (1889) I L R 13 All 1 (F B).

see *Krishnamachariar* v. *Mangammal* (1) Art. 182 of the Limitation Act literally and give a fresh starting point from the date of the appeal decree at whosoever's instance the appeal might have been filed. To prevent the hardship resulting from such a rule, several exceptions have been recognised, *e. g.*, where the appeal proceeds on a common ground and imperils the whole decree, or where as in the case under review, the decree is a partition decree. The theory that a partition decree is a joint decree has been carried to such an extent that application for execution by any one of the various co-sharers has been held to be sufficient to keep alive the entire decree.

JAGANNATH PRASAD *v* JUGAL KISHORE, I. L. R. 48 All. 9.

The Hindu Law doctrine of "immorality and illegality" or more properly "Avyavaharika" debt has been creating a lot of trouble and the Courts are very much divided on the question. In this case, the point was whether amounts for which a receiver became liable by reason of his misappropriating the funds of the estate coming into his hands were such a debt. The scope of the exception has been very considerably narrowed by decisions like *Chhakauri Mahton* v. *Ganga Prasad* (2) which makes a distinction between liability in the first instance for damages in respect of a criminal act, and liability incurred to make restitution to the injured party or the liability imposed by the Court on that account. Another direction in which the exception is narrowed is that indicated in *Tirumalaiyappa Mudaliar* v. *Veerabadra* (3) which makes a distinction between liability in respect of the taking of goods by an agent when the taking itself is an offence and where the taking is not an offence by itself and apart from any further acts in relation to it imposes a civil liability on him. The mere fact of conviction cannot on these authorities, conclude the question. The further and important question would be as to whether there is a civil liability independent of and unconnected with the offence. It is no doubt a bit difficult to decide whether the liability is so connected or it is not. But it is difficult to differentiate the case of the receiver from that of an agent or trustee. Both of those cases come within the principle of *Tirumalaiyappa Mudaliar* v. *Veerabadra* (3). The cases that would come within the exception are those of a thief or a servant who would have no sort of possession at any time but mere custody.

1. (1902) I L R 26 Mad 91. 2. (1911) I L R 39 Cal 862.
3. (1909) 19 M L J 759.

JAWAHIR SINGH *v.* UDAI PARKASH, I. L. R. 48 All. 152 : 50 M. L. J. 344 (P. C.).

This case on the facts presents no difficulty but it contains an approval of the judgment of the Allahabad High Court which is said to have followed *Ganga Dayal* v. *Mani Ram* (1) and dissented from *Vigneswara* v. *Bapayya* (2) and *Doraisami Serumadan* v. *Nondisami Saluvan* (3). In a case like this, one should have very much liked to have the judgment of the High Court of Allahabad but the reporter apparently thinks otherwise and people outside are helpless in the matter as the judgment of the High Court has not been reported anywhere. But our own idea is that this approval cannot have any great disturbing effect.

What appears in the case is that the father made an unjustifiable alienation more than 12 years prior to suit and of the three sons, one had attained majority more than three years before suit and the question was whether the other sons also were not barred on that account. The father was alive at the date of the suit and therefore there could be no question of the elder brother being able to give a discharge on behalf of the younger brothers as well. He was not the manager, and in fact, Mr. Dube for the appellant conceded that the point of limitation was unarguable. If he was the manager, the learned Judges in *Ganga Dayal* v. *Mani Ram* (1) would seem to concede that he would be a person able to give discharge without the concurrence of the younger brother though according to them the question whether he is the manager would be one of fact and not a necessary consequence of his being the eldest member [judging from his question during the arguments in *Nobin Chandra Barna* v. *Chandra Madhab Barna* (4), Mr. Ameer Ali seems to be inclined the same way] *Vigneswara* v. *Bapayya* (2) is not quite satisfactory. It seems to proceed on the view that S. 8, second part (*i. e.* present S. 7), does not apply unless all the joint claimants are under a disability, a view which has not been accepted [*see* the judgment of Mr. Justice Bashyam Aiyangar in *Ahinsa Bibi* v. *Abdul Kader Saheb* (5)]. It also seems to proceed on the view that a major member of the family competent to sue on behalf of himself and others is all that is required. A somewhat similar view has been taken in *Moidin*

1. (1908) I L R 31 All 156.
2. (1893) I L R 16 Mad. 436.
3. (1912) I L R 38 Mad 118 : 25 M L J 405.
4. (1916) I L R 44 C 1 : 31 M L J 886 (P C).
5. (1901) I L R 25 Mad 26.

Kutti v. *Beevi Kutti* (6). This view is indefensible and it was from that view that *Ganga Dayal* v. *Mani Ram* (1) dissented and the Privy Council agrees with the Allahabad view. In *Ahinsa Bibi* v. *Abdul Kader Saheb* (5) Mr. Justice Bhashyam Aiyangar takes *Vigneswara* v. *Bapayya* (2) only to decide that the managing member is competent to give a discharge within the meaning of that section. He does not lay down anything beyond that *Moidin Kutti* v. *Beevi Kutti* (6) has been taken to decide in *Parameswaran Nambudri Pad* v. *Sankaran Nambudri Pad* (7) that in the case of a Malabar Tarwad, the adult Anandravans are persons that can give a discharge along with the karnavan though the karnavan is himself the party in default. In *Doraisami Serumadan* v. *Nondisami Saluvan* (3), the alienation was by the mother as guardian during the minority of two undivided brothers. The elder of them attained majority more than 3 years before suit and the question was whether the other brother was barred. Mr. Justice Abdur Rahim held he was—Mr. Justice Sundara Aiyar thought he was not so far as his share was concerned and the judgment of Mr. Justice Abdur Rahim was upheld in appeal. Neither Mr. Justice Abdur Rahim nor the Judges in appeal went so far as to hold that the existence of any adult member was sufficient to bring the case within S. 7. All that they held was that the elder being manager, the suit was barred. The point of distinction according to Mr. Justice Sundara Aiyar was—that the right was not a joint right and that Art. 44, the article applicable to the case made the attainment of majority the starting point and S. 7. which applied to joint rights alone could not be invoked in aid of the defendant. The conclusion in *Doraisami Serumadan* v. *Nondisami Saluvan* (3) is not quite satisfactory and might require re-consideration. But we have hardly the materials for it in the judgment of the Privy Council. All that we can read into the judgment of the Privy Council is, we think, that the extreme view taken in *Vigneswara* v. *Bapayya* (2) that the existence of an adult member or the view taken in *Parameswaran* v. *Sankaran* (7) that the majority of one of the existing members at the time of alienation is sufficient to take the case out of the section is untenable; more than that, it is difficult to read into the judgment.

1. (1908) I L R 31 All 156. 2. (1893) I L R 16 Mad 436.
3. (1912) I L R 38 Mad 118 : 25 M L J 405.
5. (1901) I L R 25 Mad 26. 6. (1894) I L R 18 Mad 38.
7. (1914) M W N 689.

AMRIT LAL SEAL *v.* JAGAT CHANDRA THAKUR, I. L. R. 4 Pat. 696.

The decision might well have been rested upon the facts of the particular case but as the learned Judges preferred to adopt a broader ground, they have laid down that where a decree itself directed a sale of certain property, it is not open to the executing Court to refuse to carry out the sale even on the ground that the sale of the property is prohibited by law. They draw a distinction between sales in execution of money decrees and sales under mortgage decrees and emphasise the limitations upon the powers of the executing Court. [See also *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupathi etc., Devastanam* (1)]. We may go a long way in agreeing with the learned Judges, but it seems to us it may not yet follow that decisions like *Raja of Vizianagram* v. *Dantivada Chellayya* (2) are wrong. Some of the authorities referred to by Mullick, J. are also not quite to the point. The first step to recognise is that the prohibition against voluntary transfer is not co-extensive with that against attachment and sale; (*cf.* S.6 of Transfer of Property Act with S. 60, Civil Procedure Code) so that, if parties choose to mortgage property whose transfer is not prohibited by S. 6 of Transfer of Property Act, a sale thereof on foot of a decree obtained upon the mortgage cannot be objected to on the strength of the prohibition in S. 60, Civil Procedure Code. This is all that was laid down in *Bhagvandas* v. *Hathibai* (3). The case in *Bhola Nath* v. *Mt. Kishori* (4) where objection was taken in the suit itself and not at the execution stage) does not carry us much further but it is useful as recognising the distinction between cases where the transfer of the property is prohibited by law and cases where it is not. In the former class of cases, where a mortgage of such property is sought to be enforced, the Court will ordinarily refuse to uphold the mortgage or decree a sale. But if by inadvertence it passes a decree for sale, even in respect of such property, there arises a conflict between two principles, viz., the rule of substantive law prohibiting the sale and the processual rule as to the limited powers of the executing Court. We must, however, state that, we do not see how a decree directing sale of such

---

1. (1909) I L R 32 Mad 429 : 19 M L J 401.
2. (1904) I L R 28 Mad 84 : 14 M L J 468.
3. (1879) I L R 4 Bom 25.
4. (1911) I L R 34 All 25.

property can ordinarily be vacated except in so far as a review may be possible. The rule that an executing Court cannot listen to any objection to the validity of the decree or to the jurisdiction of the Court which passed it [see *Hari Govind* v. *Narsing Rao* (5) and *Maharaja of Bharatpur* v. *Rani Kano* (6)] is not without its own limitations—as for instance, when a decree purports to be passed against a deceased person or against a minor defendant without a guardian *ad litem* [cf. *Arunachalam Chetty* v. *Abdul Subhan Sahib* (7) *Subramania Aiyar* v. *Vaithinatha Aiyar* (8) and *Jungli Lall* v. *Laddu Ram Marwari* (9)], though it may be permissible to doubt whether the Calcutta High Court has not gone too far in this respect in the Full Bench decision in *Gorachand Haldar* v. *Bafulla Kumar Roy* (10). In the class of cases now in question, the refusal of the executing Court to carry out the sale is sought to be justified on a slightly different ground, viz., that the prohibition against the sale, so far as it rests upon grounds of public policy, ties the hands of the executing Court quite as much as it would have tied the hands of the trial Court had the matter been raised before it and that the mere existence of a decree for sale cannot override the rule prohibiting the sale. We are not sure if this line of reasoning need necessarily be regarded as illogical or fallacious. The question is really one of preference between two accepted principles where they come into conflict. Where the prohibition against transfer is not sufficiently imperative or is merely meant for the benefit of private parties, the position will of course be different. A distinction has also been suggested—not perhaps without some justification—between cases where the decree for sale has been passed on compromise and those where it rests upon an adjudication by the Court, though, in inadvertence of the rule of prohibition *Ramasami Naik* v. *Ramaswami Chetty* (11) and *Lakhmanaswami Naidu* v. *Rangamma* (12). It must, however, be admitted that looked at merely from the point of view of the rule of procedure as to the powers of the executing Court, there is no reason why an executing Court should be more at liberty to question a compromise decree than to deal with a decree passed on contest.

5. (1913) I L R 38 Bom 194. 6. (1900) I L R 23 A 181 at 190 (P C).
7. (1925) 50 M L J 232. 8. (1913) I L R 38 M 682.
9. (1919) 4 Pat L J 240. 10. (1925) 29 C W N 948: 89 I C 685.
11. (1907) I L R 30 M 255 at 262: 17 M L J 201.
12. (1902) I L R 26 M 31.

SHIAM LAL *v.* RADHE BALLABH, I. L. R. 48 A. 34.

The point raised in this case was as to the right of the Court to make provision for the value of improvements effected by a co-owner on joint property. One way in which the Court makes allowance for it is by allotting such property to the improving co-sharer much on the same principle as when a particular part of the property is sold by a co-owner, attempt is made by the Court to allot it to the alienee. It is a well-recognised rule of English Law that a co-owner incurring expenses for lasting improvement, though not entitled to sue for contribution, is entitled to be given allowance for at the partition especially where a sale takes place to the extent the value has been enhanced by the improvement. Lindley, p. 36. *In re Jones, Farrington* v. *Forrester* (1), *In re Cook's Mortgage, Lawledge* v. *Tyndall* (2), *Leigh* v. *Dickenson* (3) *Shephard* v. *Jones* (4) and *Henderson* v. *Ashwood* (5) apply a somewhat similar rule to mortgagees. As Lord Macnaughten puts it in the latter case, it would be contrary to common justice to deprive him of the benefit of the money laid out by him on those improvements, so far as they enhanced the value of improvements. In making allowance for improvements, he is chargeable with the rent of the part of in his occupation, *i. e.,* to say the rent for which he might in justice and equity though not in law be accountable to the other co-owners or the mortgagor, as the case may be. The right to allowance for improvements is not confined to cases where an account is directed as to the rent. Nor does it seem to be confined to cases of sale. For we have Lord Justice Cotton arguing in *Leigh* v. *Dickenson* (3) : "Whether the property is divided or sold by the decree of the Court one party cannot take the increase in value without making an allowance for what has been expended in order to obtain that increased value. There is, therefore, a mode by which money expended by one tenant-in-common for repairs can be recovered but the procedure is confined to suits for partition." *In re Watson: Turner* v. *Watson* (6) it was argued that the power to make the allowance is confined to cases of sale in a partition action but the argument was not accepted. In *Subbiah* v. *Gundlapudi* (7) the right is confined to improvements effected with consent. This is sought to be justified

1. (1893) 2 Ch 461, 478.
2. (1896) 1 Ch 923.
3. (1884) 15 Q B D 65, 67 and 69.
4. (1882) 21 Ch D 469.
5. (1894) A C 150.
6. (1896) 1 Ch 925.
7. (1922) 46 M 104.

by reference to the authorities but it does not seem to be so. If there is request or consent, in the view of the Judges in *Leigh* v. *Dickenson* (3), an action for contribution will lie. It is only when there is no consent that the question arises and all the Judges that took part in *Leigh* v. *Dickenson* (3) seem to be agreed as to the propriety of making an allowance. It may be conceded that they did not consider the limits of the doctrine but consent is not indicated as an essential condition for the exercise of the equity. Possibly, one co-tenant will not be permitted to improve another out of the property. That principle could be deduced from the requirement as to the reasonableness of the improvement. That would certainly have a bearing on the question of *bona fides*.

NAGENDRA NATH PALIT *v.* RABINDRA NATH DEB, I. L. R. 53 Cal. 132.

This decision is of value as reviewing the authorities on the question of the alienability of relgious offices and brings out in clear relief the distinction between cases of alienation of the temporalities of the idol and those of the office of manager itself, a distinction which, though well recognised, is some times apt to be overlooked. Some of the observations in *Mahamaya Debi* v. *Haridas Haldar* (1), especially those regarding the validity of the usage of alienating religious offices, have led to some misapprehension of the law on the subject and the question was considered at some length with reference to the cases that had appeared till then in article in 33 M. L. J. (Journal) 27. The learned Judge in this case has taken a somewhat bolder line, criticising the cases which are of doubtful correctness, as for instance, those in *Mancharam* v. *Pranshankar* (2), *Rajeshwar Mullick* v. *Gopeshwar Mullick* (3) and *Nirad Mohini Dassi* v. *Shibadas Pal Dewasin* (4). Again the learned Judge has considered whether the term "benefit" with reference to alienations of properties by limited owners, guardians, managers and shebaits can be understood as merely meaning propriety or reasonableness as it is sometimes done. See *In re Krishnaswami Doss Reddi* (5) where a learned Judge of the Madras High Court

3. (1884) 15 Q B D 65, 67 and 69.

1. (1914) I L R 42 Cal 455.
2. (1882) I L R 6 Bom 298.
3. (1907) I L R 35 C 226.
4. (1909) I L R 36 C 975.
5. (1912) M W N 167.

thought the term "necessary" itself should be understood as denoting nothing more than "reasonable and proper". This view is not now generally accepted and it seems after the somewhat exhaustive exposition of the law on this subject by the Privy Council in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (6) there seems much to be said in favour of the more restricted view of the term "benefit" as approximating nearly to strict necessity, which has found favour with the learned Judge in the case under notice.

[END OF VOLUME L.]

6. (1917) I L R 40 M 709.